85-4090

Supreme Court, U.S.
FILED
SEP 10 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

Supreme Court of the United States

October Term, 1985

DANIEL GLEN HUNT, by and through his father and next friend, EDWARD RAY HUNT, and EDWARD RAY HUNT and ELLEN HUNT,

Petitioners

v.

GUILFORD COUNTY BOARD OF EDUCATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

A. Frank Johns
Post Office Box 3585
Greensboro, North Carolina 27402
(919) 275-9567
Counsel for Petitioners

Of Counsel:

David B. Puryear, Jr.

September 9, 1985

QUESTION PRESENTED FOR REVIEW

When parents pursue their administrative procedural remedies under the Education for All Handicapped Children Act, 20 U.S.C. § 1415, and are deprived of findings of fact and a hearing decision, as guaranteed therein, do they state a claim for relief under 42 U.S.C. § 1983 for deprivation of a right secured by federal law?

PARTIES TO PROCEEDING IN UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DANIEL GLEN HUNT, by and through his father and next friend, EDWARD RAY HUNT, and EDWARD RAY HUNT and ELLEN HUNT and EDWARD RAY HUNT, Trustee of the Daniel Glen Hunt Fund,

Plaintiffs - Appellants,

v.

A. CRAIG PHILLIPS, State Superintendent of Public Instruction, State of North Carolina; THE NORTH CAROLINA STATE BOARD OF EDUCATION and DAVID BRUTON, Chairman; JOHN A WILLIAMS, State Budget Officer, State of North Carolina; J. A. PORTER, Controller, Department of Public Instruction, State of North Carolina; DOUGLAS MAGANN, Superintendent of Public Instruction, Guilford County, State of North Carolina; GUILFORD COUNTY BOARD OF EDUCATION and EVON DEAN, Chairman; GUILFORD COUNTY BOARD OF COMMISSIONERS and FORREST CAMPBELL, Chairman,

Defendants - Appellees

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Question Presented For Review	2
Federal Statutes And Regulations Involved	2
Statement Of The Case	3
Reasons For Granting the Writ	7
1. The decision below conflicts with the decisions of other courts of appeal as to the interplay between 20 U.S.C. § 1415 and 42 U.S.C. § 1983	7
2. The decisions below raise significant and recurring problems concerning enforcement of the right to administrative due process under EHA	10
Conclusion	13
Certificate of Service	14
Certiorari Appendix	

TABLE OF AUTHORITIES

Cases:

Board of Education v. Rowley, 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982) 11, 12

Carey v. Piphus, 435 U.S. 247, 98 S. Ct. 1042, 55 L. Ed. 2d 252 (1978) 9

Hymes v. Harnett County Board of Education, 664 F. 2d 410 (4th Cir. 1981) 9

Manecke v. School Board of Pinellas County, Florida, 762 F. 2d 912 (11th Cir. 1985) 10

Quackenbush v. Johnson City School District, 716 F. 2d 141 (2nd Cir. 1983) 10

Rose v. Nebraska, 748 F. 2d 1258 (8th Cir. 1984) 10

Smith v. Robinson, ___ U.S. ___ , 104 S. Ct. 3457, 82 L. Ed. 2d 746 (1984) 9, 12

Teresa Diane P. v. Alief Independent School District, 744 F. 2d 484 (5th Cir. 1984) 10

Statutes and Regulations:

20 U.S.C. 1401(a)(17), (18) & (19) 11
20 U.S.C. 1415(a)(1)(E) 11
20 U.S.C. 1415(c)(2) 11
20 U.S.C. 1415(d)(4) 8, 12
20 U.S.C. 1415(e)(1) 11
20 U.S.C. 1415(e)(2) 11
28 U.S.C. 1254(1) 2
42 U.S.C. 1983 2
34 C.F.R. 104.33 3
34 C.F.R. 300.508(a)(5) 8
34 C.F.R. 300.512(a)(1) & (2) 8

Miscellaneous:

H. Friendly, "Some Kind of Hearing," 123 U. Pa. L. Rev. 1267 (1975) 8

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1985

DANIEL GLEN HUNT, by and through his father and next friend, EDWARD RAY HUNT, and EDWARD RAY HUNT and ELLEN HUNT,

Petitioners,

v.

GUILFORD COUNTY BOARD OF EDUCATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioners, Daniel Glen Hunt, Edward Ray Hunt and Ellen Hunt, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on May 9, 1985.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit, App. 2, is unpublished. The opinion of the United States District Court for the Middle District of North Carolina, App. 9, is unpublished.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on May 9, 1985. Petitioners' motion for extension of time to file a petition for rehearing in banc was allowed, and the court of appeals denied the petition on its merits on June 14, 1985. App. 7. This petition for certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED FOR REVIEW

When parents pursue their administrative procedural remedies under the Education for All Handicapped Children Act, 20 U.S.C. § 1415, and are deprived of findings of fact and a hearing decision, as guaranteed therein, do they state a claim for relief under 42 U.S.C. § 1983 for deprivation of a right secured by federal law?

FEDERAL STATUTES AND REGULATIONS INVOLVED

1. Section 615 of the Education for All Handicapped Children Act ("EHA"), 20 U.S.C. § 1415, the provisions of which appear at pages 70-72, Certiorari Appendix.

2. Title 34 of the Code of Federal Regulations, Sections 300.508(a)(5) and 300.512(a)(1) & (2), provide:

> 508(a) Any party to a hearing has the right to:
>
> (5) Obtain written findings of fact and decisions. (The public agency shall transmit those findings and decisions, after deleting any personally identifiable information, to the State advisory panel established under Subpart F).
>
> 512(a) The public agency shall insure that not later than 45 days after the receipt of a request for a hearing:
>
> (1) A final decision is reached in the hearing; and
>
> (2) A copy of the decision is mailed to each of the parties.

3. The Civil Rights Act of 1871, 42 U.S.C. § 1983, provides:

> Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

The facts necessary to place the question now raised in its proper setting can be stated briefly:

Petitioner Daniel Glen ("Danny") Hunt is a profoundly retarded, autistic, self-abusive, 18-year-old child.[1] He and his parents, petitioners Ray and Ellen Hunt, live in Guilford County, North Carolina. During the school years 1976 through 1980, Danny received education, habilitation and behavior modification in a private special residential school for autistic children in Nashville, Tennessee. This program was funded by payments from a charitable fund created for Danny, and by annual $2,000 payments from the North Carolina Department of Public Instruction ("state education agency" or "SEA"), co-defendant below.

When the charitable fund began to run out in 1979, the Hunts realized they no longer could afford the private residential program. They requested that the respondent Guilford County Board of Education ("local education agency" or "LEA") provide Danny with a residential program of special education and related services, pursuant to the provisions of the EHA and regulations promulgated under § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794. See, 34 C.F.R. § 104.33. The LEA refused, and the Tennessee residential school closed. Danny continued to reside with a former teacher from the defunct Tennessee facility. The Hunts,

---

[1] Danny remains eligible for services under the Education for All Handicapped Children Act until he reaches age 21. See, 20 U.S.C. § 1412(2)(B).

through counsel, met with representatives of the SEA, the LEA, and the North Carolina Department of Human Resources ("DHR"), third-party defendants in the district court. App. 23.

Petitioners disclosed their intention to file federal suit. Thereafter, DHR agreed to fund a residential placement for Danny at a local mental retardation habilitation center operated by the Guilford County Area Mental Health, Mental Retardation and Substance Abuse Authority ("local mental health agency"). App. 23. In North Carolina, institutional and group home residential habilitation services for mentally handicapped persons are a joint undertaking of the state, through DHR, and local political subdivisions of the state, through the local mental health agencies created under Chapter 122 of the North Carolina General Statutes. A year-round residential placement has been provided to Danny by the local mental health agency since 1980, using funds provided by DHR. A daytime special educational classroom program has been provided by respondent, during the regular nine-month academic year. App. 24.

However, respondent never conceded any legal obligation to provide, and never has provided, an "individualized education plan" for Danny which included residential placement. App. 24. The funding for the local mental health agency placement was the subject of an agreement between the local mental health agency and DHR. The agreement provided for its termination at any time by either party, and for annual renegotiation. Respondent has affirmatively argued on appeal in the circuit court that the local mental health agency is not an entity governed either by EHA or by the Department of Education regulations promulgated under Section 504 of the Rehabilitation Act.

The parent-petitioners initiated the EHA administrative hearing process in 1979, when they discovered that Danny would have to leave the private residential facility in Tennessee. The parents subsequently abandoned their hearing opportunity, having been led to believe that the respondent LEA was going to defray the cost of the private placement, when the impending exhaustion of the charitable fund occurred. App. 18-19. Respondent did not pay for the private residential placement, however. When the parents discovered this, and

that Danny would be discharged from the private school, they again demanded a hearing. App. 22.

The parents, in the hearing, sought from the local school system both future placement in an appropriate residential special education program, and reimbursement of funds expended for Danny's past private placement.[2] App. 22-23.

The administrative hearing officer convened the hearing on October 26, 1979. Record evidence was taken as to Danny's condition and needs, then the hearing officer adjourned and continued the hearing, to allow the LEA and the parents to consult with other public agencies concerning available services. App. 23.

Thereafter, Danny's residential placement on "an emergency, humanitarian basis", in the local mental health agency facility was arranged. App. 23, 24, 25, 57, 62. But, no state or public agency, including respondent, would admit any legal obligation to provide to Danny a 24-hour-per-day, 365-day-per-year residential placement, in order to comply with EHA and 34 C.F.R. § 104.33.[3] App. 25-26. The respondent LEA took the position (and maintains to this day) that Danny does not need and is not legally entitled to a residential

---

[2] No issue of reimbursement is brought forward in this petition. Most, if not all, of the expenses associated with Danny's private educational services were defrayed by a charitable fund collected for Danny's benefit. The district court concluded that Danny's father, petitioner Edward Ray Hunt, was not a proper party to claim reimbursement for the charitable fund. App. 36-37. This was assigned as error in the circuit court.

[3] The district court dismissed as moot petitioners' claims for prospective declaratory and injunctive relief to adjudicate whether Danny is legally entitled to comprehensive residential therapeutic services, and if so, to affix on some defendant agency legal responsibility for the provision of these services. The district court found that there was no reasonable possibility that the defendants (collectively) would discontinue the services which Danny has been receiving since 1980. Defendants conceded in the court of appeals that the local mental health agency is not bound to provide due process under EHA. Nevertheless, the district court found that Danny's parents would have to be notified before his current residential program could be continued pending the outcome of any administrative hearings and appeals which the Hunts might initiate in such an event, pursuant to 20 U.S.C. § 1415(e)(3). App. 38. Petitioners do not bring the district court's error on the issue of mootness forward in this petition.

placement in order to benefit from a program of public education. *See,* App. 20, fn. 11, 22, 31.

Faced with respondent's denial of legal responsibility, the Hunts asked for the administrative hearing to be reopened. The LEA's hearing officer reconvened the administrative hearing on February 22, 1980, and for two days took record evidence on the nature of Danny's special educational needs. The attorneys for the parties were directed to file with the hearing officer proposed findings of fact and decision, not later than June 1, 1980. App. 57, 62.

The respondent's administrative hearing officer never has issued the required findings of fact and decision. App. 23, 40, fn. 26, 58, 62. There is no evidence or assertion in the record that respondent ever has attempted to procure the hearing officer's issuance of a decision.

The present action was filed September 29, 1980, alleging, *inter alia,* the failure of respondent to issue a hearing decision, *see,* App. 58, as grounds for relief under 42 U.S.C. § 1983. App. 58, 59. Petitioners specifically prayed for declaratory judgment that the denial of a hearing decision comprised denial of due process and made a general demand for damages. App. 59.

Respondent's answer admitted that no hearing decision had been rendered by its administrative hearing officer. App. 62.

Petitioner's moved for partial summary judgment, but not on the claim of denial of due process. App. 64. Respondent twice cross-moved for partial summary judgment, but did not move for dismissal of the claim of denial of due process. App. 66, 68. No other defendant below raised, by motion or tender of evidence, the issue of the claim of denial of a hearing decision. The transcript of the administrative hearing evidence was not made a part of the district court record.

Nevertheless, the district court addressed, on its own intiative, the due process violations raised by the pleadings. The district court concluded that the violation inherent in the deprivation of findings of fact and hearing decision was cognizable only under 20 U.S.C. § 1415, and that an action under 42 U.S.C. § 1983 on these grounds would be inconsistent with the EHA enforcement mechanism. App. 44-47. The

district court's discussion of the problem does not reach much further than this. Apparently the district court further reasoned that reimbursement for private educational services was the only available EHA remedy for any violation of the Act. App. 33, 46, 51. The district court concluded that reimbursement was not appropriate relief on the facts of this case. App. 33-37. Thus, the district court seemingly felt free to dismiss the action, without any sanction being imposed on the LEA for denying to petitioners the binding administrative adjudication which it was their right to obtain under EHA. The district court in any event dismissed the entire action. App. 52.

Neither the petitioners nor the respondent sought summary judgment or tendered evidence to support summary judgment on the claim for relief arising from the denial of a hearing decision. No evidence was submitted by any defendant below to controvert respondent's admission that no administrative hearing decision was rendered. No evidence was submitted by any party below on the factual issues of the existence or extent of harm to petitioners resulting from the deprivation of a written administrative hearing decision. The district court made no finding of uncontroverted fact concerning injury to petitioners resulting from the procedural due process denial. *See* App. 23. Consequently, the district court's decision on this issue must be viewed as a dismissal for failure to state a claim upon which relief could be granted either under 42 U.S.C. § 1983 or 20 U.S.C. § 1415. *See* App. 51. The court of appeals' *per curiam* affirmance does not address the issue, though it was assigned as error and argued extensively by petitioners and respondent on the appeal.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEAL AS TO THE INTERPLAY BETWEEN 20 U.S.C. § 1415 AND 42 U.S.C. § 1983.

Section 1415 of Title 20 of the United States Code grants to parents of handicapped children a "right" to obtain written

findings of fact and a written decision in an administrative hearing, conducted to resolve complaints of denial of appropriate educational services to be provided in compliance with the Education for All Handicapped Children Act ("EHA"). 20 U.S.C. § 1415(d)(4). These procedural rights are mirrored in the federal Department of Education regulations promulgated under the authority of the act. 34 C.F.R. §§ 300.508(a)(5), 300.512(a)(1) & (2).

The district court addresses the petitioners' complaints concerning the administrative process at several points in its memorandum opinion. The district court purported to find as a fact the following:

> When the Hunts voiced complaints about the decision of the local education defendants concerning Danny's placement upon his return for the 1979-1980 school year, defendants did not deny the Hunts any avenue for administrative relief under state law or make a sham of those avenues. App. 47.

The district court's purported finding of fact is clearly contrary to the respondent's judicial admission in the record. The respondent admitted that no written findings of fact or hearing decision were ever entered by the respondent's hearing officer. App. 62. One plain form of denial of an avenue of administrative relief is the failure or refusal to make a decision on the record. *See,* H. Friendly, "Some Kind of Hearing," 123 U.Pa. L. Rev. 1267, 1278 *et. seq.* (1975).

And yet, the district court erroneously concluded that:

> To the extent a plaintiff would complain that officials failed to comply with the procedures set out in federal and state law, he would have a cause of action for that compliance under the EAHCA and could recover reimbursement. *Anderson v. Thompson,* 658 F.2d at 1214. Here, plaintiffs took advantage of administrative remedies available under state and federal law and exhausted those remedies. See, *Hymes v. Harnett County Board of Education,* 664 F.2d 410 (suit under § 1983 allowable where court cannot acquire jurisdiction under EAHCA to pass upon alleged illegality). At least as to those matters here arising after the EAHCA became binding on North Carolina school systems, the Court has

jurisdiction and can grant appropriate relief under the EAHCA. As to those matters such relief is exclusive in light of the comprehensive nature of the EAHCA's remedial scheme. See, *Pennhurst State School and Hospital v. Halderman,* 451 U.S. 1, 101 S. Ct. 1531, 67 L.Ed.2d 694 (1981). (Where the governing statute provides an exclusive remedy, § 1983 is not applicable). App. 46.

The Fourth Circuit affirmed the district court's dismissal of the entire action, including petitioners' claims under 42 U.S.C. § 1983 for denial of administrative due process, without discussion of the issue. App. 4, 6. This holding is in apparent conflict with the Fourth Circuit's own prior opinion in *Hymes v. Harnett County Board of Education,* 664 F.2d 410 (4th Cir. 1981). The decisions below are also in substantial conflict with the decisions of several other federal courts of appeals which have addressed this issue of jurisdiction under EHA and 42 U.S.C. § 1983 in circumstances where procedural violations arising in the administrative enforcement scheme under EHA are alleged.

This Court, last term, expressly noted the existence of this "confusion" in the federal circuits on the issue presented in the present case. *Smith v. Robinson,* ___ U.S. ___ , n. 8, & ___ , n. 17, 104 S.Ct. 3457, 3465, n. 8, & 3470-71, n. 17, 82 L. Ed. 2d 746 (1984) (citing *Hymes*). Although this Court found it unnecessary in *Smith v. Robinson* to decide the issue here presented, the question is one which has arisen frequently in the federal circuits. Unlike *Smith v. Robinson,* the present case cannot be resolved by an alternative factual determination of ineligibility for the mone-tary relief sought. If it be conceded that a claim under 42 U.S.C. § 1983 is available in this case, the petitioners have been denied an opportunity to present proof of damages flowing from the due process violation. If the judgment of dismissal below is reversed, then petitioners are entitled to proceed to jury trial to recover at least nominal damages and to prove the actual damages proximately resulting from the deprivation of EHA procedural rights. *Cf., Carey v. Piphus,* 435 U.S. 247, 262, 266, 98 S. Ct. 1042, 1051, 1054, 55 L. Ed. 2d 252 (1978).

Several circuits have followed the lead of the *Hymes* decision in concluding that 42 U.S.C. § 1983 is an available source of relief for denials of procedural due process to par-

ent's bringing complaints under EHA. See, *e.g.*, the Second Circuit's ruling in *Quackenbush v. Johnson City School District,* 716 F.2d 141 (2nd Cir. 1983), *cert. denied,* ___ U.S. ___ , 104 S. Ct. 1426, 79 L. Ed. 2d 750 (1984), rejecting the argument that a plaintiff denied the opportunity to avail herself of the procedural safeguards established in the EHA was restricted to relief solely under the EHA, and holding that 42 U.S.C. § 1983 supplies the right of action to a plaintiff who has been denied those procedural safeguards. *Quackenbush,* 716 F.2d at 148. A very recent Eleventh Circuit opinion, *Manecke v. School Board of Pinellas County, Florida,* 762 F.2d 912 (11th Cir. 1985), follows the *Quackenbush* decision, as well as *Teresa Diane P. v. Alief Independent School District,* 744 F.2d 484 (5th Cir. 1984), and *Rose v. Nebraska,* 748 F.2d 1258 (8th Cir. 1984), in holding "that where, as here, the local educational agency deprives a handicapped child of due process by effectively denying that child access to the heart of the EHA administrative machinery, the impartial due process hearing, an action may be brought under § 1983." *Manecke,* 762 F.2d at 919.

The Fourth Circuit's summary affirmance of the district court's memorandum opinion below is in conflict with the cited post-*Smith v. Robinson* circuit court opinions addressing the interplay between EHA and 42 U.S.C. § 1983. This conflict justifies a grant of certiorari to review the judgment below.

2. THE DECISIONS BELOW RAISE SIGNIFICANT AND RECURRING PROBLEMS CONCERNING ENFORCEMENT OF THE RIGHT TO ADMINISTRATIVE DUE PROCESS UNDER EHA.

The Fourth Circuit and district court opinions below treat important statutory and policy considerations growing out of the administrative procedural rights accorded parents and handicapped children under EHA. After having had occasion to raise these issues in *Smith v. Robinson,* this Court chose to leave them undecided. There are compelling reasons why a definitive guideline for application of 42 U.S.C. § 1983 to procedural due process violations under EHA should now be resolved by this court. Efforts to create federal jurisdiction

under 42 U.S.C. § 1983, in circumstances where the EHA administrative hearing process breaks down, are common occurrences. Both litigants and lower courts need the assistance of this court in understanding the appropriate resolution of this interplay between the EHA due process rights and 42 U.S.C. § 1983.

In *Board of Education v. Rowley,* 458 U.S. 176, 102 S. Ct. 3034, 73 L. Ed. 2d 690 (1982), this Court noted that "the importance Congress attached to these procedural safeguards [embodied in § 1415] cannot be gainsaid." *Rowley,* 458 U.S. at 205, 102 S. Ct. at 3050. However, the court action provided by the terms of 20 U.S.C. § 1415 is available only to a "party aggrieved by the findings and decisions... with respect to the complaint presented pursuant to this Section..." 20 U.S.C. § 1415(c)(2). By its terms, the statute limits the subject matter which may be heard in a court action thereunder to an "appeal," 20 U.S.C. § 1415(e)(1), to review "the findings and decision" of an impartial hearing officer appointed by a local or state education agency in compliance with the Act. 20 U.S.C. § 1415 (e)(2).

Further, the aggrieved party may bring a civil action only "with respect to the complaint presented pursuant to this section." *Id.* Subsection (a)(1)(E) of § 1415 limits the subject matter of "the complaint presented pursuant to this section" to "any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free, appropriate public education to such child." A complaint of denial of the EHA procedural right to written findings and decision on the record is not a "matter relating to the identification, evaluation or educational placement of the child, or the denial of a free, appropriate public education to such child." *See,* 20 U.S.C. §§ 1401(a)(17), (18) & (19). Thus, the procedural safeguards of the Act do not provide an avenue for the parents to pursue a complaint and obtain an impartial, binding adjudication, with respect to the failure of the education agency to comply with these very procedural safeguards.

The complaint in this case is that the respondent school system failed to issue or procure the issuance of administrative hearing findings and decision. The district court concluded that 20 U.S.C. § 1415 conferred exclusive jurisdiction to hear this complaint (but that petitioners were not entitled

to relief under EHA in this case.) Neither does the plain language of the statute provide exclusive jurisdictional grounds for complaining of procedural violations, nor does it actually provide subject matter jurisdiction at all.

Yet, these procedures, including the rendering of written findings of fact and a hearing decision, are mandatory under the Act. The Act speaks in terms of "the right to written findings of fact and decisions". 20 U.S.C. § 1415(d)(4). This is consistent with this Court's observation that "it seems to us no exaggeration to say that Congress placed every bit as much emphasis upon the *compliance* with procedures giving parents and guardians a large measure of participation at every stage of the administrative process... as it did upon the measurement of the resulting IEP against a substantive standard." *Rowley,* 458 U.S. at 205-206, 102 S. Ct. at 3050 (emphasis supplied). The present issue is embedded in the heart of EHA. The degree of enforceability of the procedural rights granted to parents by EHA is the measure of the overall efficacy of the statute. The statute serves the compelling public purpose of protecting the constitutional right of millions of handicapped children to equal educational opportunity. *Smith v. Robinson, supra.,* at ____ , 104 S. Ct. at 3468. The legislative mechanism, carefully devised by Congress to achieve this purpose, elevated highly formalized parental participation in the education agency's decision-making process over the adoption of a particular substantive standard for determining the appropriate educational program for the handicapped child. *Board of Educational v. Rowley, supra.* If there is no sanction on the public agencies for denying the parents their statutory procedural rights, then EHA becomes a hollow mockery. By virtue of the doctrine of exhaustion of administrative remedies, the parents of a handicapped child are required to participate (at their own expense, *Smith v. Robinson, supra)* in the formal EHA administrative adjudicatory process, if they believe their child's minimal substantive rights under the Act are being violated. But, by the rule of the decisions below in this case, the education agencies need only refuse to issue any binding administrative hearing decision on the record, and the parents are forced to re-litigate, exclusively under EHA, the substantive and procedural issues in federal court (again, at their own expense, *Smith v. Robin-*

son). By this simple expedient of refusing to decide, the education agencies can double or treble the expense and time required of parents trying to protect their handicapped child. The education agencies apparently may do this with impunity, if the holdings below are allowed to stand uncorrected.

The issue of the appropriate jurisdictional vehicle for protecting these rights secured by federal law has been a recurring and persistent one in the federal courts because the ultimate vitality of the entire EHA turns upon its resolution. It is a question which has required the circuit courts of appeals to attempt to discern the implications of this Court's recent ruling in *Smith v. Robinson*. In the present case, the district court did not have the advantage of the *Smith v. Robinson* decision, and the Fourth Circuit simply declined to discuss it, while implicitly retreating from its own leading decision in *Hymes*. The division and uncertainty over the important statutory issue left unaddressed in *Smith v. Robinson* is still unsettled in the circuit courts and remains a question that commonly arises. Parents of handicapped children and public education officials alike will benefit from a definitive decision which determines the extent to which compliance with the EHA procedural safeguards is subject to enforcement under 42 U.S.C. § 1983. This case requires attention and resolution by this Court.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Fourth Circuit and the district court.

Respectfully submitted,
A. Frank Johns
239 North Edgeworth Street
Post Office Box 3585
Greensboro, North Carolina 27402
(919) 275-9567
Counsel for Petitioner

Of Counsel:
David B. Puryear, Jr.

CERTIFICATE OF SERVICE

I certify that on the 9th day of September, 1985, I served the foregoing and attached Petition for Writ of Certiorari and Certiorari Appendix on Respondent by depositing three copies thereof in the United States Postal Service first-class, postage prepaid, addressed as follows:

John W. Hardy, Esq.
James W. Lung, Esq.
Counsel for Guilford County
Board of Education
Post Office Box 419
Greensboro, North Carolina 27402

This the 9th day of September, 1985

A. Frank Johns
Counsel for Petitioners

85-409

Supreme Court, U.S.
FILED
SEP 10 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. _____

IN THE

Supreme Court of the United States

October Term, 1985

DANIEL GLEN HUNT, by and through his father and next friend, EDWARD RAY HUNT, and EDWARD RAY HUNT and ELLEN HUNT,

Petitioners

v.

GUILFORD COUNTY BOARD OF EDUCATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

CERTIORARI APPENDIX

A. Frank Johns
Post Office Box 3585
Greensboro, North Carolina 27402
(919) 275-9567
Counsel for Petitioners

Of Counsel:

David B. Puryear, Jr.

TABLE OF CONTENTS

	Page
Opinion of United States Court of Appeals for the Fourth Circuit	2
Order of the United States Court of Appeals for the Fourth Circuit, Denying Rehearing	7
Memorandum Opinion and Order of United States District Court for the Middle District of North Carolina	9
Petitioners' Amended Complaint, Excerpted Allegations of Denial of Due Process	53
Respondent's Answer, Excerpted Responses to Petitioners' Allegations of Due Process Violation	60
Petitioners' Motion for Partial Summary Judgment	64
Respondent's Cross-Motion for Partial Summary Judgment	66
Respondent's Motion for Partial Summary Judgment on Issue of Damages	68
20 U.S.C. § 1415	70

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 84-1713

UNPUBLISHED

Daniel Glen Hunt, etc., et al.,
Appellants,

vs.

A. Craig Phillips, etc., et. al.,
Appellees

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Hiram H. Ward, District Judge. (C/A 80-519).

Argued: January 9, 1985 Decided: May 9, 1985

Before RUSSELL and CHAPMAN, Circuit Judges and HAYNSWORTH, Senior Circuit Judge.

A. Frank Johns (David B. Puryear, Jr.; Booth, Harrington, Johns & Campbell on brief) for Appellants; James W. Lung (Douglas, Ravenel, Hardy, Crihfield & Lung on brief) and Margaret Dudley, Assistant County Attorney; and Edwin M. Speas, Jr., Special Deputy Attorney General, North Carolina Department of Justice for Appellees.

PER CURIAM:

Plaintiffs Daniel Glen Hunt and his parents appeal from a memorandum opinion and order of the district court granting defendants' motion for summary judgment on the issue of damages and dismissing plaintiffs' claims for injunctive and declaratory relief for defendants' failure to provide Danny Hunt, an autistic child, with a free and appropriate public education including twelve-month educational and residential service during the years beginning in 1976. We affirm.

I

Danny Hunt is a severely emotionally handicapped child whose most serious conditions are autism and severe mental retardation. Until 1976, Danny attended day school at Sternberger Elementary School in Greensboro, North Carolina. In 1976 Danny's parents began to seek a full residential placement for Danny due to his hyperactivity and self-injurious behavior at home. Failing to find any in-state permanent residential placement, the Hunts enrolled Danny at Walden House, a Tennessee residential facility for autistic children.

Since the tuition at Walden House was $1200 per month, the Hunts sought assistance from the Board of Education of Guilford County, North Carolina, in paying Danny's expenses. The Board helped the Hunts obtain an Educational Expense Grant of $2,000 per school year for the years 1975-76, 1976-77, and 1977-78. In addition to this financial aid, the Hunts relied on a private charitable fund, the Danny Hunt Fund, established by a concerned citizen, Shelba Forrest, for the purpose of paying for Danny's residential and educational placement which at that time was at Walden House. Only Shelba and Robert Forrest, however, had authority to make withdrawals from the Fund.

In 1979 Walden House closed and Danny temporarily was placed with a volunteer worker from Walden House. Once aware of the closing, the Guilford County School System created a class for multi-handicapped students in a local elementary school and requested that Danny enroll. The Hunts, however, instituted a due process hearing asserting that Danny required homestyle educational and residential liv-

ing arrangements. The hearing officer disagreed, and Danny enrolled in the elementary school program. For his residential placement, Danny was placed initially at the Kendall Center, a residential facility for mentally handicapped persons operated by Guilford County, and later transferred to Gallimore House, a group home operated with funds from the Guilford County Area Mental Health Authority.

Although fully satisfied with Danny's residential and educational placement, the Hunts instituted this action in an attempt to obtain reimbursement from the school system for the money paid to Walden House out of the Danny Hunt Fund. In addition, the Hunts sought damages for the regression in Danny's condition due to defendants' failure to provide him with a residential placement which forced him to return to Guilford County. Furthermore, the Hunts sought assurances in the form of declaratory and injunctive relief that the defendants would continue to provide Danny with educational and residential placement on a twelve-month basis. Plaintiffs also claimed that they were denied due process of law in violation of the fourteenth amendment and 42 U.S.C. § 1983 because no final administrative hearing decision was ever made. Plaintiffs charged that defendants' failure to provide, pay for or insure that Danny would be given a free, appropriate education including twelve-month educational and residential services violated the Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1401 *et seq.*, as well as § 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

Plaintiffs moved for partial summary judgment restricting their motion to claims under the Education for All Handicapped Children Act of 1975 and § 504 of the Rehabilitation Act of 1973 arguing that the defendants violated these statutes during 1976-80 when Danny was at Walden House or residing with the prior employee of Walden House in Tennessee. All of the defendants filed cross-motions for summary judgment. The district court, granted summary judgment in favor of the defendants on the issue of damages and dismissed plaintiffs' complaint *in toto* declaring as moot plaintiffs claim for injunctive and declaratory relief. Specifically, the court held that Edward Hunt, Danny's father, was not a trustee of the Danny Hunt Fund, a trust, and hence was not the real party in interest as to the procurement of reimbursement for monies spent by

the fund for Danny's placement at Walden House. Regardless of this determination, however, the court held that the question of reimbursement could not be resolved on a motion for partial summary judgment since it required determining facts concerning the good faith actions of the school system which were not developed.

As to the plaintiff's claim under § 504, 29 U.S.C. § 794, the court held that while § 504, 29 U.S.C. § 794, provides handicapped persons with an implied cause of action for relief for discrimination because of their handicap and the regulations promulgated thereunder direct the placement of a child in residential facilities if necessary for the child's education, the Supreme Court in *Southeastern Community College v. Davis,* 442 U. S. 397 (1979) held that § 504 does not compel recipients of federal funds like defendants to undertake affirmative action to change their programs, especially when such action may be both financially and administratively burdensome. The district court found the Hunts' request that the school system provide a new program, including residential placement, to be overly burdensome and thus not required under § 504. Alternatively, the court found that even if this new program was required under § 504 there was no evidence from which an inference of intentional discrimination against Danny could be drawn which would warrant the award of damages. Finally, the court held that even if damages were recoverable for unintentional discrimination, monetary relief under § 504 should be limited solely to reimbursement which also was found not to be proper in this case.

On the issue of whether the Hunts were due injunctive and declaratory relief as to Danny's continued residential placement, the court found that while a school system must provide a residential placement if necessary for any handicapped child to benefit from his educational instruction, the Hunts' request was moot since Danny was and would be receiving year round residential and educational placement which was satisfactory to the Hunts. Additionally, the court held that while a state policy of restricting educational services to 180 days per year is unlawful under the Education for All Handicapped Children Act of 1975 since such a policy contravenes a basic principle of the Act that educational programs must be individualized, plaintiffs presented no evidence

that the school system's 180 day policy had an inhibiting effect on Danny. Instead, plaintiffs' counsel stated that plaintiffs were pleased with Danny's current treatment which at that time included a year round independent educational program.

The primary issue on appeal is whether the district court erred in drawing the aforementioned conclusions and in granting summary judgment in favor of the defendants. Based on our review of the record and the district court's opinion and order, *Daniel Glen Hunt v. A. Craig Phillips,* No. C-80-5196 [sic] (M.D.N.C., June 6, 1984), we are satisfied that the district court's decision is in accordance with the applicable law. Accordingly, the decision of the district court is

AFFIRMED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT
No. 84-1713

Filed June 14, 1985

Daniel Glen Hunt, etc., et al,	)
Appellants,	)
	)
versus	)
	)
A. Craig Phillips, etc., et al,	)
Appellees,	)
	)
versus	)
	)
North Carolina Department of Human Resources	)
Third Party Defendant.	)

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Hiram H. Ward, District Judge.

Upon consideration of appellants' motion for extension of time to file their petition for rehearing and suggestion for rehearing in banc,

It is ORDERED that the motion is granted.

The appellants' petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Chapman, with the concurrence of Judge Russell and Judge Haynsworth.

For the Court,

JOHN M. GREACEN
Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

DANIEL GLEN HUNT, by and through his father and next friend, EDWARD RAY HUNT, and EDWARD RAY HUNT and ELLEN HUNT, and EDWARD RAY HUNT, Trustee of Daniel Glen Hunt Fund, *Plaintiffs*	)	
v.	)	C-80-519-G
A. CRAIG PHILLIPS, State Superintendent of Public Instruction, State of North Carolina; THE NORTH CAROLINA STATE BOARD OF EDUCATION and DAVID BRUTON, Chairman; JOHN A. WILLIAMS; State Budget Officer, State of North Carolina; J.A. PORTER, Controller, Department of Public Instruction, State of North Carolina; DOUGLAS MAGANN, Superintendent of Public Instruction, Guilford County, State of North Carolina; GUILFORD COUNTY BOARD OF EDUCATION and EVON DEAN, Chairman; GUILFORD COUNTY BOARD OF COMMISSIONERS and FORREST CAMPBELL, Chairman *Defendants*	)	

GUILFORD COUNTY BOARD OF EDUCATION,
Defendant/Third Party Plaintiff

v.

NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES,
Third Party Defendant

MEMORANDUM OPINION AND ORDER
Filed June 6, 1984

WARD, Chief Judge

Plaintiffs brought this action on September 29, 1980, seeking relief for alleged violations of their rights under state and federal constitutional, statutory, and regulatory laws. Presently before the court are numerous motions and cross-motions by the parties. The defendants can be divided, conceptually, into three groups, the local education defendants, the local non-education defendants, and the state education defendants.[1] The third party defendant, the State Department of Human Resources, has also filed a dispository motion.

Before addressing these motions, the Court will review the pleadings and discuss the facts. On January 30, 1981, plaintiffs filed a motion for Preliminary Injunction and Amended Complaint for Declaratory and Injunctive Relief and for Damages for Deprivation of Federal and Civil Rights.

[1] The defendants can be grouped as follows: (1) local non-education defendants (Guilford County Board of Commissioners and Forrest Campbell, Chairman); (2) local education defendants (Guilford County Board of Education, Evon Dean, Chairman, and Douglas Magann, Superintendent of Public Instruction for Guilford County); (3) state education defendants (A. Craig Phillips, State Superintendent of Public Instruction, State Board of Education, David Bruton, Chairman, John A. Williams, State Budget Officer, J.A. Porter, Controller of Department of Public Instruction).

Plaintiffs seek to recover for past expenses for the education of Danny Hunt, a severely autistic child, and to obtain the continued and future provision of a free, appropriate public education for Danny.

The plaintiffs, Edward R. and Ellen Hunt, Danny's parents, verified the Amended Complaint. Plaintiffs state therein that they "seek injunctive (and declaratory) relief and damages for the alleged failure of defendants to provide Danny with a free, public education and residential services necessary and appropriate to meet his unique needs." Amended Complaint at ¶ 1. This failure allegedly was in violation of the Fifth and Fourteenth Amendment guarantees of due process and equal protection; the Education of All Handicapped Children Act of 1975 (EAHCA), 42 U.S.C. §§ 1401-20; the regulations promulgated under the EAHCA at 45 C.F.R. §§ 121a.1 - 121a.754 (1980)(currently found at 34 C.F.R. §§ 300.1 - 300.754); section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794; the regulations promulgated under section 504 at 45 C.F.R. §§ 84.1 - 84.61 (1980); and the Civil Rights Acts of 1871 and 1964, 42 U.S.C. §§ 1983 & 2000d (Title VI). Plaintiffs also alleged the failure violated the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6001-81. Plaintiffs further alleged that the omission was in violation of Article 45 of Chapter 115 of the North Carolina General Statutes and sections 5 and 7 of Article IX, North Carolina Constitution.

On February 1, 1982, defendant Guilford County Board of Education filed a Third Party Complaint against the North Carolina Department of Human Resources (DHR) wherein the County School Board alleged that a dispute exists between itself and DHR "concerning the extent to which each agency is required to provide special education and related services to Danny Hunt under North Carolina law." The County School Board seeks declaratory judgment as to DHR's responsibilities under state and federal law.

In its Answer (January 10, 1982) to the Amended Complaint, the County School Board crossclaimed against co-defendant Guilford County Board of Commissioners seeking an order compelling the co-defendant to provide special education and related services to Danny in the event affirmative relief for plaintiffs is ordered. The County School Board also

crossclaimed against the State Board of Education (State Board) for declaratory judgment as to that co-defendant's responsibilities under laws providing educational services to handicapped children.

The matters now before the Court are the following motions and cross-motions for summary judgment or partial summary judgment.

(1) Plaintiffs' Motion for Partial Summary Judgment (May 18, 1983).
(2) Third-Party Defendant DHR's Motion for Summary Judgment (July 20, 1983).
(3) Response to Plaintiffs' Motion for Partial Summary Judgment and Cross-Motion for Partial Summary Judgment (July 20, 1983) of local education defendants.
(4) State Education Defendants' Cross-Motion for Partial Summary Judgment (July 21, 1983).
(5) Motion for Partial Summary Judgment on the Issue of Damages (November 14, 1983) of the local education defendants.
(6) Motion for Summary Judgment (February 9, 1984) of local non-education defendants.

Numerous affidavits and exhibits were submitted by each of the parties in support of or in opposition to one or more of the motions. The parties have previously filed other affidavits and exhibits which the Court reviewed. The following facts appear in the record compiled from these several submissions.

Danny Hunt is a severely autistic child. The events pertinent to this action begin in 1976 when Danny was just turning nine years old.[2] From 1974 to early 1976 Danny received educational services at the Sternberger School in Greensboro, North Carolina, Danny's hometown. The program at that school was administered by the Division for Treatment and Education of Autistic and Related Communications Handicap-

[2] On six occasions in 1975 Danny received respite care (temporary care) at the Henry Wiseman Kendall Center, which falls under the immediate auspices of the County Board of Commissioners. In July, 1973, Danny was referred to the Kendall Center, but his mother declined help. Response of Guilford County Board of Commissioners, et al. to the Plaintiffs' Motion for Partial Summary Judgment, Affidavit of Arthur Peoples at ¶ 2 (July 20, 1983).

ped Children (TEACCH) of the Department of Psychiatry at the University of North Carolina - Chapel Hill. The TEACCH program provided day training and education for Danny together with parent training and other services to insure continuity of treatment when Danny returned home each day after school. The county school system and Danny's parents arrived at the TEACCH program through their joint efforts. The school system reimbursed the parents for transportation expenses to and from the Sternberger School as well as for taxi fare to and from an after school day care program at McIver School in Greensboro. Affidavit of Dr. Sarah C. Magann at ¶ 3 (July 20, 1983) (Dr. Magann was the Director of Exceptional Child Services for the Guilford County Schools from 1972 to 1979).

The day program was appropriate to meet Danny's needs at the school, but Danny's parents found themselves unable to contend with their son's increasing self-abusive behavior and hyperactivity at home. Affidavit of Edward Ray Hunt and Ellen Hunt at ¶ II (May 18, 1983)(hereafter Hunts' Affidavit). Danny's parents began in early 1976 to seek out a residential placement for him. If the Hunts were able to provide Danny with home care,[3] then a residential placement would not be necessary in order for Danny to benefit from public education (the TEACCH program).

The Hunts testified that they asked the County School Board for a residential placement and related services, but that board refused the request. Hunts' Affidavit at ¶ II. It was the County School Board's belief that the TEACCH program supplemented by day care was appropriate. Dr. Magann's Affidavit at ¶¶ 5 & 6. Margaret Lansing, a psychologist and education specialist who had observed Danny at the Sternberger School in 1973-75 testified that the program was appropriate at that time. Affidavit (July 21, 1983). Records of the Murdoch Center located in Butner, North Carolina, and operated by DHR lend support to the school system's analysis of the situation in 1976. A report in the records on Danny dated April 5, 1976, recommended continuation of the TEACCH program and efforts to get the Hunts more involved

[3] The Court should not be understood to be critical of the parents' difficulties in providing for their son in the home.

in following through at home with the programs and techniques.[4] DHR's Memorandum in Opposition to Plaintiffs' Motion for Partial Summary Judgment, Exhibit 3, Report at 3 (July 19, 1983).

The Hunts testified that their request for admission of Danny to the Murdoch Center was denied. Apparently, they sought a permanent residential placement. The Murdoch Center did admit Danny for respite care, a thirty day admission from February 16, 1976, to March 16, 1976. Ellen Hunt signed the agreement with the center for the respite care. DHR's Memorandum, Exhibit 3, Respite Services Contract. The Murdoch Center is a respite care facility. Apparently, the reason the center granted the admission was as much concern for Ellen Hunt who suffered severe agitated depression caused by Danny's presence in the home, as concern for Danny. DHR's Memorandum, Exhibit 3, Letter from Dr. R.L. Garber (Ellen Hunt's physician) to Murdoch Center.

The Hunts also sought permanent residential placement for Danny at the Kendall Center in early 1976 but the request was denied. In 1976 the Kendall Center did not have the facilities or staff to maintain Danny on a permanent residential basis. DHR's Memorandum in Support of Motion for Summary Judgment, Affidavit of Elizabeth P. Dishler at ¶ 7 July 20, 1983); Affidavit of Nancy Dubois (August 21, 1981).[5]

Because the Hunts found themselves unable to manage Danny at home or find a placement for Danny locally, they withdrew Danny from the TEACCH program and unilaterally placed him at the Walden House, a private center for autistic children in Tennessee. The Hunts made these arrangements on March 15, 1976, and enrolled Danny at the Walden House

---

[4] Directors of TEACCH described the program as a method seeking to avoid institutionalization of the autistic child by means of home teaching and behavior management and by structuring the child's total environment. Affidavits of Eric Shopler and Gary B. Mesibov (July 21, 1983). However, they also stated that aggressive, self-injurious behavior, inadequate community services, and insufficient family resources are factors indicating a need for residential placement.

[5] Elizabeth P. Dishler was the Chief of Child Mental Retardation Services for the Mental Retardation Section of Mental Health, Mental Retardation and Substance Abuse Services of DHR. Nancy Dubois was the treatment coordinator of Children's Services at the Kendall Center.

on April 23, 1976. Hunts' Affidavit at ¶ III. The Hunts requested assistance from the school system in paying the expenses for Danny's placement at Walden House.[6] The school system informed the Hunts that it believed the TEACCH program together with day care at McIver School was appropriate for Danny. Nevertheless, the system agreed to fund Danny's travel expenses to and from Walden House and assisted the Hunts in obtaining an Education Expense Grant for Exceptional Child (EEG). Affidavit of Dr. Sarah C. Magann at ¶¶ 5-7. The Hunts made the EEG application in June, 1976.[7] Brief in Support of Plaintiffs' Motion for Summary Judgment, Exhibit A, EEG Application. The State Board of Education approved the application and forwarded a $2,000 check, the maximum,[8] to Walden House for the 1976-77 school year. Hunts' Affidavit at ¶ VIII.

The county school superintendent, E.P. Pierce, Jr., certified on the form EEG application that Danny "has special educational needs which cannot be met in the public schools."[9] Dr. Magann explained that the system approved the grant because "the TEACCH program and the other services provided Danny could be appropriate only if the parents were willing to cooperate with the program and participate." Affidavit at ¶ 6. In other words, the county's public schools could not meet Danny's exceptional needs because, in the absence of full, appropriate parental involvement, the school system's program for Danny would not work.

---

[6] In April, 1976, the tuition at Walden House was $1,200 per month. The tuition increased to $1,300 per month in July, 1976, to $1,500 per month in July, 1977, and to $2,200 per month in October, 1978.

[7] The EEG application dated June 1, 1976, listed donations to the Danny Hunt Fund as an available fund for the tuition.

[8] N.C.Gen.Stat. § 115-315.10 (repealed effective July 1, 1981).

[9] Without this certification the State Board cannot approve the grant. N.C.Gen.Stat. § 115-315.7 (repealed effective July 1, 1981). Since the State Board approved the EEG and two subsequent EEGs for Danny at Walden House, the inference fairly arises without contradiction that the State Board did not find Walden House to be an improper place for Danny. Of course, this is not to say that the State Board disagreed with the local board's analysis of the situation, *i.e.*, the appropriateness of the TEACCH program if the parents would continue to be involved.

Shortly prior to Danny's enrollment at Walden House, an article about Danny appeared in the February 22, 1976, edition of the Greensboro Daily News, the major local newspaper. Deposition of Edward R. Hunt, Exhibit 2 (February 13, 1984). The article expressed the Hunts desire for a private residential placement for Danny. A second article appeared in the newspaper on March 21, 1976, stating that Walden House had accepted Danny. Deposition of Edward R. Hunt, Exhibit 1. The article also reported that Shelba Forrest established a fund for Danny after reading the first article. Her plan was to raise money to pay Danny's tuition at Walden House ($1,200 per month). Several persons became administrators of the Danny Hunt Fund. Edward Hunt testified that the Fund originated with the articles and identified the articles as "documents relating to the creation, purpose, authority, status, or existence of the Danny Hunt Fund...." Deposition of Edward R. Hunt at 6 & 7. However, Edward Hunt testified that the Fund existed for a broader purpose — to meet "whatever expenses may be incurred in any way, shape, or form, that it would be used for his benefit, as such it was used for his benefit," including legal fees underlying this lawsuit. Deposition of Edward R. Hunt at 7, 41, 44-45, & 76. The only persons with authority to withdraw money from the Fund's bank account were Shelba Forrest and her husband. Whenever Danny needed money for expenses the Hunts would request the Forrests to write a check, although the Forrests made direct payments to Walden House for its bills and tuition. Deposition of Edward R. Hunt at 7, 9-11 & 13. The Hunts would identify Danny's needs and the Forrests would write the checks to cover these needs. The Hunts never received account statements during the life of the Fund. The account's title was "Danny Hunt Fund c/o Shelba Forrest." Deposition of Edward R. Hunt, Exhibit 3, Account Statement. Robert Forrest, Shelba's husband, prepared the Fund's income tax returns. Deposition of Edward R. Hunt at 11, 14, & 63 and Exhibits 3 & 4.

According to the Hunt's Affidavit at paragraph X, they did not again approach any government body or official concerning Danny until August, 1977, when they again asked "the local education authority" (county superintendent and school board) to bear the expense of Danny's education. They

further testify that their request was granted to the extent of approval of another EEG. Brief in Support of Plaintiffs' Motion for Partial Summary Judgment, Exhibits B & C.[10] The State Board sent a $2,000 check to Walden House in July, 1978, pursuant to the August, 1977, application.

Following application for the second EEG the Hunts had no additional contact with any government body or official concerning Danny's needs until August, 1978. At that time, they testify, they again requested the county school system to pay for Danny's education, but again were informed that an EEG was the limit on assistance. Hunts' Affidavit at ¶ XIII. They applied in August, 1978, for a third EEG. Plaintiffs' Brief in Support of Motion, Exhibit D, EEG Application. The Administrative Placement Committee initially recommended denying the request because it believed Danny could be appropriately placed in the school system. Dr. Magann's Affidavit at ¶ 8. The Hunts initiated an administrative proceeding. The purpose of this proceeding is not clear. Plaintiffs' attorney during oral argument stated that the issues concerned the EAHCA, *i.e.,* whether Danny could be appropriately placed in Guilford County, whether Walden House was appropriate if placement in the county was inappropriate, and who was obliged to pay Danny's educational expenses at Walden House. The defendants' attorneys stated the issue was whether the Hunts were entitled to an EEG, *i.e.,* whether Danny could be placed in the school system. A hearing was scheduled for March, 1979.

In November, 1978, Dr. Thomas Sajwaj, a psychologist, examined Danny at the request of Walden House and the county school system "in order to assist in the determination of the most appropriate educational program for Danny." Plaintiffs' Brief in Support of Motion, Exhibit G. Dr. Sajwaj advised continued enrollment and treatment at Walden House or a similar permanent residential placement and advised against a home setting. Actions contrary to this advice, Dr. Sajwaj feared, would cause regression and a reoccurence of

[10] Exhibit B is a memo from Sarah Smith, the county's Director of Exceptional Child Services, dated September 26, 1977. It plainly indicates that the local school system maintained contact with Walden House concerning Danny.

self-injurious behavior.

On March 5, 1979, Arnold Rincover, a psychologist, observed Danny at the request of the school system and submitted an evaluation on March 10. Affidavit of Arnold Rincover with Evaluation attached (May 18, 1983). Dr. Rincover concluded that Danny required, and continues to require, twenty-four-hour-per-day supervision by trained personnel on a year-round basis. Without constant supervision, Dr. Rincover advised, Danny's educational gains would deteriorate and self-injury could occur. In his evaluation, Dr. Rincover recommended the availability of contingent shock therapy to curtail self-injurious behavior by Danny should Danny return to the county school system.

The recommendation regarding shock therapy prompted the Administrative Placement Committee on March 15, 1979, to reverse its prior recommendation and to recommend approval by the Superintendent of the EEG application because the school system did not have available the use of contingent shock therapy or personnel trained in that technique. Affidavit of Dr. Magann at ¶¶ 6 & 8. The new superintendent, Douglas P. Magann, III, signed the certification (*see* footnote 9 and accompanying text) on the application on March 16, 1979, following the Administrative Placement Committee's recommendation of March 15, 1979, that he sign. The basis of the committee's recommendation was that the "School System is unable to provide an appropriate placement for Danny because, and only because, of the necessity for the use of contingent electric shock therapy or treatment as a precondition to educational services." Plaintiffs' Brief in Support of Motion, Exhibit E. The committee also stated that "Danny should continue to attend Walden House until appropriate residential services can be offered in North Carolina." The State Board forwarded a check to Walden House on June 7, 1979.

On March 19, 1979, the superintendent met with the Hunts and Al Singer, an attorney with the Governor's Advocacy Council for the Mentally Handicapped, and others to discuss Danny. The Hunts testified that the purpose of the meeting was to discuss Danny's future placement and the school system's responsibility for his education and that the superintendent promised that the system would pay fully for

Danny's expenses at Walden House from then on. Hunts' Affidavit at ¶ XIV. Al Singer testified that the superintendent promised the system would begin paying Danny's tuition at Walden House until it was determined that Danny appropriately could be returned to North Carolina. Affidavit of Al Singer at ¶ 4 (May 18, 1983).

The Superintendent, Douglas P. Magann, testified that he told the Hunts about his approval of the EEG application and that there were several questions involved in the responsibilities of various agencies for Danny's placement which needed clarification. The superintendent denied any agreement that the county school board "would be *solely* responsible for any of the costs... at Walden House." Affidavit of Douglas P. Magann, III at ¶ 4 (February 25, 1981)(emphasis added). However, the superintendent admitted that "it was agreed that the Hunts would submit a statement from Walden House showing a breakdown of the tuition between education, residential and related services and that the Guilford County School System would attempt to get other agencies to fund the non-educational portion of this tuition." The Court interprets this testimony to mean that the superintendent agreed that the school system would only pay for the educational portion of Danny's tuition, and not for residential placement expenses.

The administrative proceeding was terminated by the Hunts. It is not clear whether termination resulted from Superintendent Magann's approval of the EEG application on March 16 or his discussion with the Hunts on March 19.

The Hunts testified that other than the $2,000.00 EEG nothing was paid by any government agency subsequent to the March 19 meeting. There is no evidence the Hunts supplied the school system with a tuition breakdown as requested. However, as he indicated at that meeting, the superintendent sent a letter to Dr. Jerome H. Melton, Deputy State Superintendent, presenting the county system's questions concerning the scope of its responsibility for meeting Danny's educational needs. Plaintiffs' Brief in Support of Motion, Exhibit J.[11] He requested a resolution to these questions by May, 1979, when the Danny Hunt Fund was projected to be exhausted.[12]

Superintendent Magann unfortunately received no

speedy answer or resolution to the school system's questions. (Indeed, those questions are the subject of disputes in this lawsuit among the defendants and third party defendant.) In June, 1979, the Hunts received word that Walden House was going to cease operations. Presumably, the Tennessee school closed its doors that summer of 1979. The Hunts decided to place Danny in the private home of Daisey Grey, a former employee of Walden House, where Danny continued to receive educational training from Dave Morgan, the former director of Walden House. The Hunts also began to search for an alternative placement. Hunts' Affidavit at ¶ XVI. Daisey Grey had agreed to a temporary placement. Affidavit of Daisey Grey at ¶ 4 (August 28, 1981).

The three EEG's totalling $6,000 of course did not cover Danny's tuition at Walden House. However, it is patently evident that the Danny Hunt Fund was meeting these expenses, together with Supplemental Security Income checks of $126.00 per month. Plaintiffs' Brief in Support of Motion, Exhibits A & D. In plaintiffs' brief in support of their motion for partial summary judgment they represented that they and the Fund spent $56,336.00 to provide Danny's education needs at Walden House ($49,886.00) and to maintain his continuous educational program at a private home for several months after Walden House closed in the summer of 1979

[11] The superintendent asked whether the "local administrative unit," the county school system, had to absorb the cost of providing an adequate (educational) program for children as severely handicapped as Danny. He stated the system's belief that the cost of special programs is a state responsibility. He asked if other state or local agencies have responsibilities to provide related services, *i.e.*, contingent shock therapy and residential care. He did not believe the county system had those responsibilities. He asked if a local education agency could refuse to provide related services under routine special programs for a child with special needs who has been so identified by another local education agency, *i.e.*, the county school system. In discussing this issue, the superintendent revealed the system's frustrations in seeking assistance from other public agencies. He also raised the question of which agency must bear the expense of the summertime needs of a child like Danny, when regular school is not in session.

[12] The Fund continued to meet Danny's educational expenses beyond May, 1979. Deposition of Edward R. Hunt, Exhibit 8; *see* text accompanying footnote 12 above.

($6,450.00).[13] Financial records of the Danny Hunt Fund indicate that the Fund as of September 25, 1979, paid $54,281.00 to Walden House or to Walden House employees for summer residential programs for Danny. Deposition of Edward R. Hunt, Exhibit 13. Exhibits 7 and 8 of that deposition show that the Fund paid out $59,673.21 during its existence to cover the educational expenses of Danny as well as other expenses. Exhibits 7 and 9 also show that the Hunt's share of the above-noted $49,886.00 figure (Walden House education and related expenses) was $126.27, and of the $6,450.00 figure (private home education and related expenses) was $900.00, for a total of $1,026.27 expense. However, Exhibit 7 further shows that the Fund reimbursed the Hunts for this $1,026.17 expense. Deposition of Edward R. Hunt at 22. The Fund paid the entire $56,336.00 expense for meeting Danny's educational needs at Walden House and at the private home, the expense as represented by plaintiffs in their trial brief at pages 9-10 and attached Affidavit at paragraph XVIII.[14]

---

[13] The Court will later address in more detail the events of 1978-80 during which time administrative hearings were held, Walden House closed, and Danny returned to Guilford County for enrollment in a new residential placement.

[14] On February 2, 1984, plaintiffs filed new affidavits of the Hunts wherein they testified that they spent in excess of $1,200.00 during 1978-80 for the educational and residential needs of Danny. Plaintiffs' Response and Brief in Opposition to Guilford County Board of Education Defendants' Motion for Partial Summary Judgment on the Issue of Damages, Affidavits of Ellen and Edward R. Hunt at ¶ 3 (February 1, 1984). This affidavit stands in contradiction to their representation in their brief and earlier affidavit, as well as the exhibits to Edward Hunt's deposition. In contrast to those exhibits these new affidavits are not itemized. It would appear that the Court is witness to a distasteful attempt to patch a weakness in the Hunts' request for reimbursement found in their motion for partial summary judgment, *i.e.*, the Fund paid all the expenses ($56,336.00) represented by plaintiffs as expenses to meet Danny's educational needs in Tennessee up to his return to Guilford County and enrollment in a residential placement there. In light of these circumstances, the new affidavits do not disturb their earlier *de facto* admissions concerning payment of expenses for Danny's educational needs which by definition here includes residential placement. *Barwick v. The Celotex Corp.*, No. 83-1479, slip op. at 31 (4th Cir. June 7, 1984).

The county school system became aware of the closing of Walden House from the Hunts and promptly went ahead with plans for a class for multi-handicapped children appropriate for Danny. Affidavit of Dr. Sarah C. Magann at ¶ 9. In August, 1979, the county school system advised the Hunts that it intended to return Danny to Guilford County for enrollment in a multi-handicapped program at Jamestown Elementary School. Hunts' Affidavit at ¶ XVII. The Hunts requested to assist in the program's development. The program as envisioned involved parent training so that Danny could be properly supervised at home, although Dr. Magann advised the Hunts of alternative publicly funded residential placements. Affidavit of Dr. Sarah C. Magann at ¶ 9. The Hunts testified that Sara Smith, a school system official, informed them that the Jamestown program would operate only during the regular school session of 180 days per year and that the system would only be responsible for maintaining the continuity of educational regimen during the normal school day. Hunts' affidavit at ¶ XVII.

The county school board hired Dr. Rincover in September, 1979, as a consultant to help devise a program for Danny. Dr. Rincover was of the opinion that the school system's individualized educational program for Danny for the 1979-80 school year was adequate. Affidavit of Arnold Rincover at ¶¶ 1 & 2 (February 26, 1981).

In October, 1979, Dr. Sajwaj re-evaluated Danny while he was at the home of Daisey Grey. He was impressed by Danny's performance in this "home-style living" arrangement and recommended a similar arrangement over residential programming. Plaintiffs' Brief in Support of Motion, Exhibit I.

When the Hunts learned that the school system planned to return Danny to Greensboro, they requested a due process hearing under EAHCA[15] to challenge the appropriateness of the proposed non-residential placement and to request reimbursement for the educational expenses in Tennessee for the 1978-79 school year. A due process hearing was held in the late fall of 1979 before Walter Johnson, the hearing officer.

[15] N.C.Gen.Stat. § 115-179.1 (repealed effective July 1, 1981 and recodified at § 115C-116).

To date the hearing officer has rendered no decision on the Hunts' complaint. However, the hearing officer found the educational component of the individualized educational plan designed for Danny to be appropriate, but ordered the parties, the Hunts and the local education defendants, to contact other government agencies and jointly plan, if possible, a placement for Danny satisfactory to the Hunts. Affidavit of Dr. Sarah C. Magann at ¶ 10; Affidavit of Douglas P. Magann at ¶ 2.

Pursuant to the hearing officer's direction the Hunts, the local education and state education defendants, DHR, and local service agencies attended a conference in Greensboro on or about November 26, 1979. DHR and local service agencies offered the Hunts placement alternatives, including Murdoch Center, but the Hunts rejected them. DHR's Memorandum in Support of Motion for Summary Judgment, Affidavits of Jane B. Duffield at ¶ 3 and Michael S. Pedneau at ¶ 2 (July 20, 1983).[16] The Hunts rejected the idea of placing Danny in the custody of the State Department of Social Services in order to receive Title XX funding of out-of-state education services. Affidavit of Jane B. Duffield at ¶ 13. There is no evidence the defendants' proposals were dishonest or made in bad faith.

Although the parties' attempt in November, 1979, to find a solution to their differences was fruitless, the need for an immediate solution became even more pressing because Daisey Grey and Dave Morgan intended to discharge Danny because of lack of funds. Affidavit of Daisey Grey at ¶ 7; Affidavit of Dave Morgan at ¶ 6 (August 26, 1981). In obedience to the hearing officer's directive, the Hunts and representatives of several agencies met again on January 18, 1980, in Raleigh. This meeting proved to be more successful because the conferees were able to reach an oral agreement for the local residential placement of Danny. Affidavit of Jane B. Duffield at ¶ 4.

The agreement provided for a bifurcated version of residential placement which plaintiffs' counsel described at oral argument as providing Danny with wonderful care. Edward

[16] Duffield is the former Chief of the Planning Section of DHR, 1978-81. Pedneau was the Director of the Division of Plans and Operations of DHR from November, 1978, to February, 1980.

Hunt also believes Danny has received good care.[17] Deposition of Edward R. Hunt at p. 69. Various agencies agreed to a residential placement despite the fact that Dr. Rincover did not consider it necessary so long as Danny's parents were trained in how to supervise their son so as to maintain treatment gains achieved in school and support services were available to provide occasional relief and transportation for Danny. Dr. Rincover assisted in the development of the residential placement program for Danny. Affidavit of Arnold Rincover at ¶¶ 4 & 5. Affidavit of Douglas P. Magann at ¶¶ 4 & 5.

Since Danny's return to Guilford County on January 15, 1980, he has received education and residential care from two local educational agencies, the local school board and the county Mental Health, Mental Retardation and Substance Abuse Program which operates Kendall Center. Currently, plaintiff resides at the Gallimore Dairy Road Group Home (Gallimore Home), which is funded by the county Mental Health, Mental Retardation and Substance Abuse Program (Area Program). DHR Memorandum in Support of Motion for Summary Judgment, Affidavit of Elizabeth P. Dishler at ¶ 6 (July 20, 1983)(Dishler is an official with the Mental Retardation Section of the program). During the regular school year Danny attends a special class at Jamestown Elementary School under the aegis of the county school board.[18] From the end of each school day until the beginning of the next day as well as on weekends and during the summer, Danny receives education and training under the auspices of the Area Program. Affidavit of Nancy Dubois at ¶ Ic (August 21, 1981)(Dubois is the treatment coordinator for Children's Services at the Kendall Center).

---

[17] The attorney's comment and Edward Hunt's statement do much to eviscerate the testimony of Dave Morgan, the director at Walden House, that the services currently offered Danny are not appropriate. Affidavit of Dave Morgan at ¶ 8.

[18] As of July, 1983, the multi-handicapped classroom at Jamestown Elementary School was a self-contained classroom with three students, one teacher, and one teacher's aide. Affidavit of Vickie F. King at ¶ 1 (July 10, 1983). Vickie King, Danny's teacher, reports that Danny has shown substantial progress. *See also* Affidavit of Sara Smith at ¶ 7 (February 26, 1981).

Danny has a separate individualized educational program (IEP) at the school and at his residence. Each IEP was prepared and carried out by different professionals and staff, although Dr. Rincover and his assistants have assisted in coordinating these dual activities.[19] Affidavit of Nancy Dubois at ¶¶ IE & IIB; Affidavit of Douglas P. Magann at ¶¶ 4-6.

As previously indicated, the creation of this placement for Danny resulted from the fact that Danny's discharge from the Tennessee private home was imminent. A decision by DHR to commit funds on an emergency basis to provide Danny a residential placement outside the home was the catalyst to the program. The school system already had set up the special class at Jamestown Elementary School for Danny and at least one other child. At the meeting in Raleigh on January 18, 1980, DHR agreed to provide funding for staff and extended hours of programming at Kendall Center out of humanitarian motives. DHR did not believe (and contends here also) that it had no legal obligation to provide Danny with a residential placement.[20] In January, 1980, DHR's Division of Mental Health and Mental Retardation Services directed the transfer of $23,128 from the Caswell Center Project to the "North Central Regional for the purpose of providing comprehensive residential services for Danny Hunt at Kendall Center, Greensboro." Affidavit of Elizabeth P. Dishler, Exhibit 1 at 22.

DHR agreed to the emergency funding of Kendall Center until the local Area Program could incorporate the residence

---

[19] The two IEP's were set up for Danny in March, 1980, with the Hunts' consent. Dr. Rincover stated that Danny's progress under the IEP's has been accepted and approved by the Hunts. It was the doctor's opinion that the dual IEP system constitutes an appropriate educational program and that continuous twenty-four hour residential and educational programs in the same setting are not essential for an appropriate education. He also advised that the joint IEP program of participation by the county schools during the regular school year together with the overall residential program at Kendall Center (currently the Gallimore Dairy Road Group Home) after school hours and during the summer will not result in any significant regression if properly run. Affidavit of Arnold Rincover at ¶¶ 5-9 (February 26, 1981). Danny's teacher at Jamestown Elementary School, Vickie King, testified that Danny suffered no significant regression as a result of the summer breaks and regression has been quickly overcome. Affidavit of Vickie F. King at ¶ 2.

program into its budget. DHR Memorandum in Support of Motion for Summary Judgment, Affidavit of Michael S. Pedneau at ¶ 3. This emergency funding was meant to last until June 30, 1980. At this time the group residence where Danny resides became a part of the regular budget of the Area Program, the agency responsible for operation of the residence. DHR allocates funds to the Area Program based on its budget as adopted by the Area Program and approved by DHR. The county Area Program is the direct provider of services to Danny. Affidavit of Elizabeth P. Dishler at ¶¶ 5 & 9. It is the county Area Program which must initially decide (and has initially decided) to fund and operate the Gallimore Home. DHR provides funds to the Area Program as requested and the Area Program in turn funds the home. DHR Memorandum in Support of Motion for Summary Judgment, Affidavit of Jane P. Duffield at ¶¶ 5-6.

The EAHCA is an incentive grant program by which the federal government provides funds to assist state and local educational agencies to educate handicapped children. The EAHCA conditions receipt of these funds upon the state's compliance with certain prerequisites and procedures including the adoption of a policy "that assures all handicapped children the right to a free appropriate public education." 20 U.S.C. § 1412(1). The state must submit this policy together with a detailed plan for its implementation to the Commissioner of Education for approval. 20 U.S.C. §§ 1412, 1413. The statute broadly defines handicapped children, 20 U.S.C. § 1410(1), and the parties do not dispute that Danny falls into

---

[20] DHR desired to have a written agreemnent explicitly stating that its agreement to provide emergency funding at the Kendall Center was motivated by humanitarian reasons and was not to be understood as a concession of legal obligation to provide Danny a residential placement. Affidavit of Elizabeth P. Dishler at ¶¶ 7 & 8 and Exhibit 1 at pp. 6-8 (Agreement). The emergency funding was intended to insure Danny's placement at Kendall Center on a twenty-four hour basis until June 30, 1980. The Hunts never signed the Agreement because their attorney objected to the omission by DHR of a certain prefatory factual statement in the proposed written agreement. That statement described the cause of the January 18 emergency meeting in Raleigh as the nonpayment of cost of care and lack of services for Danny upon his return. Affidavit of Elizabeth P. Dishler, Exhibit 1 at pp. 14-15 (Letter from plaintiffs' attorney to Sarah T. Morrow, DHR Secretary, dated February 22, 1980).

that category. The EAHCA directs that the free appropriate public education must be tailored to meet the individual needs of the child by means of an "individualized educational program" (IEP). 20 U.S.C. § 1401(18). The IEP, which must be reviewed annually, 20 U.S.C. § 1404(a)(5), is formulated jointly by the child's parents or guardians, teachers, and other school officials. 20 U.S.C. § 1404(19).

The EAHCA's provisions reveal Congress' desire to have extensive parental involvement in the education of handicapped children. Not only must parents or guardians be invited to assist in the formulation of the IEP, but the statute also bestows upon them the right to be notified of any change in "the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child," and the right to bring a complaint about "any matters relating to" such evaluation and education. 20 U.S.C. § 1415(b)(1)(D) & (E); *Board of Education v. Rowley*, 458 U.S. 176, 182 & n.6, 102 S.Ct. 3034, _____ , 73 L.Ed.2d 690, 697 & n.6 (1982). In order to participate in the grant program states must provide parents or guardians with procedures whereby they can voice their complaints at the administrative level. At a minimum the state must provide an initial due process hearing and, if this initial hearing is below the state level, an appeal to the state educational agency. 20 U.S.C. §§ 1415(b)(2), (c), & (d). Finally, "[a]ny party [*i.e.*, parent] aggrieved by the findings and decisions" at the administrative level has "the right to bring a civil action with respect to the complaint..." in state or federal district court "without regard to the amount in controversy" and the trial court may grant such relief as is appropriate. 20 U.S.C. § 1415(e)(2).

Section 504 of the Rehabilitation Act, 29 U.S.C. § 794, provides in pertinent part that "[n]o otherwise qualified handicapped individual... shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefit of, or be subjected to discrimination under any program or activity receiving Federal financial assistance...." Section 504 is much broader than the EAHCA since it covers such matters as discrimination in employment as well as education. However, section 504 is not as elaborate a statutory mechanism to address Congress' concern over the education of handicapped

children as is the EAHCA, which Congress enacted subsequent to section 504. Regulations, initially promulgated in 1977 under section 504, provide that elementary and secondary school systems receiving federal financial assistance must provide procedural safeguards for handicapped children in respect to identification, evaluation, or educational placement. 45 C.F.R. § 84.36 (1980). This regulation further provides that compliance with the EAHCA's procedural scheme satisfies this regulatory requirement. Furthermore, 45 C.F.R. § 84.33, in effect, requires such school systems to provide educational opportunities parallel to those mandated by the EAHCA, including residential placement if "necessary to provide a free appropriate public education to a handicapped person...." The handicapped person is the party benefited by section 504 and is the party with standing thereunder. *Sanders v. Marquette Public Schools,* 561 F.Supp. 1361, 1368 & 1370 (W.D.Mich. 1983).

The North Carolina General Assembly has enacted legislation in compliance with the EAHCA as well as the regulations under section 504. N.C.Gen.Stat. §§ 115c-106 - - 116 (1983); N.C.Gen.Stat. §§ 115-363 - - 377 (1978 Repealed). Plaintiffs do not challenge the adequacy of state law to comply with the EAHCA or the regulations under section 504. The State of North Carolina did not become subject to the requirements of the EAHCA until it began to receive federal funds although the statute's effective date is October 1, 1977. *Scokin v. State of Texas,* 723 F.2d 432 (5th Cir. 1984). Plaintiffs did not challenge the defendants' statement that the State became subject to the EAHCA on September 1, 1978. *See* 20 U.S.C. § 1412(2).

Plaintiffs restricted their motion for partial summary judgment to their claims under the EAHCA and section 504 and contended that the defendants violated these statutes during 1976-80 when Danny was at Walden House and the Grey home in Tennessee. Plaintiffs seek reimbursement for the cost of Danny's private education in Tennessee. They have also contended that the policy of the State Board of Education restricting *per se* educational services at Jamestown Elementary School to 180 days per year is unlawful under the EAHCA and section 504.

180 DAY POLICY

The state policy of restricting educational services to 180 days per year is unlawful under the EAHCA because the policy by implication contravenes a basic principle of the EAHCA that educational programs must be individualized to be appropriate. *Yaris v. Special School District,* 728 F.2d 1055 (8th Cir. 1984); *Battle v. Pennsylvania,* 629 F.2d 269 (3d Cir. 1980), *cert. denied,* 452 U.S. 968 (1981); *Phipps v. New Hanover County Board of Education,* 551 F.Supp. 732 (E.D.N.C. 1982); *Georgia Association of Retarded Citizens v. McDaniel,* 511 F.Supp. 1263 (N.D.Ga. 1981), *aff'd,* 716 F.2d 1565 (11th Cir. 1983)(U.S.App.Pndg.). The state policy is not saved by the state education defendants argument that local education agencies may organize and fund summer education sessions. The state educational agency has the responsibility under federal and state law to ensure that the local agencies provide an appropriate education to handicapped children within their respective jurisdictions. N.C.Gen.Stat. § 115c-110; 20 U.S.C. §§ 1401(7), 1412(6), 1412(6), 1414.

The State is obliged under the EAHCA as a recipient of funds to provide Danny a free appropriate public education which "consists of educational instruction specially designed to meet the unique needs of [Danny], supported by such services *as are necessary* to permit the child 'to benefit' from the instruction." *Board of Education v. Rowley,* 458 U.S. at 188-89, 102 S.Ct. at _____ 73 L.Ed.2d at 701. (Emphasis added). If Danny can benefit from instruction 180 days per year, then the state policy would not be violative of the EAHCA. However, any such determination must be individualized for Danny. The State cannot deny Danny the services he needs in order to benefit from educational instruction simply because similar services are not extended to the nonhandicapped. "[T]he appropriateness of an education [for purposes of the EAHCA] is a function not of cost but of the actual or potential educational benefits conferred." *William S. v. Gill,* 572 F.Supp. 509, 516 (W.D.I11. 1983); *see also Hessler v. State Board of Education,* 700 F.2d 134, 139 (4th Cir. 1983)(state must provide personalized instruction); *cf. Bales v. Clarke,* 523 F.Supp. 1366, 1370 (E.D.Va. 1981)(summer session not required since summer regression

would not be extraordinary or irretrievable).

Plaintiffs presented no evidence that the 180 day policy has had an inhibiting effect upon educational opportunities of handicapped children. Although the policy has been applied to Danny, Danny has not been harmed thereby because he is and has been receiving educational services pursuant to an IEP year-round since his return to Guilford County. Plaintiffs' counsel stated at the hearing that plaintiffs are most pleased with Danny's current treatment which he described as being "wonderful." Nevertheless, under the statutes immediately cited above, it remains the responsibility of the State Board of Education and local educational agency to ensure that, so long as Danny is covered by the EAHCA, he receives the statutorily mandated free appropriate public education. *Kruelle v. New Castle County School District,* 642 F.2d 687, 696-97 (3d Cir. 1981); *William S. v. Gill,* 572 F.Supp. 509; *Hines v. Pitt County Board of Education,* 497 F.Supp. 403, 406 (E.D.N.C. 1980).

NECESSITY OF A RESIDENTIAL PLACEMENT

Plaintiffs have contended in their motion for partial summary judgment that as of 1976 Danny's handicap had become so severe that a residential placement was absolutely required. The evidence on this contention raises a factual issue. Prior to Danny's enrollment at Walden House, he attended the Sternberger School in Greensboro and received educational instruction through the TEACCH program. The local school system also provided an after school day care service as well as transportation reimbursement. Danny's parents sought a residential placement for Danny because they could no longer cope with Danny's presence in their home. The inability of a child's parents to cope with the child's handicap may be a factor against the appropriateness of the current educational program. *See North v. District of Columbia Board of Education,* 471 F.Supp. 136 (D.D.C. 1979). However, the EAHCA and the pertinent regulations under section 504 concern the education of the handicapped child. An issue of fact exists whether Danny was benefiting from the educational instruction he received at the Sternberger School. If he was benefit-

ing, neither he nor his parents are entitled to a residential placement because the educational instruction there would be better. *Board of Education v. Rowley,* 458 U.S. at 188-89, 198, 201-204, 102 S.Ct. at _____ , 73 L.Ed.2d at 701, 707, 708-710; *Department of Education v. Katherine D.,* 727 F.2d 809, 813-814 & n.4 (9th Cir. 1983); *Hessler v. State Board of Education,* 700 F.2d at 139; *Bales v. Clarke,* 523 F.Supp. at 1370-71. If a child is benefiting from educational instruction received in a school setting, the purposes of the EAHCA and the regulations under section 504 are met. The affidavits of Drs. Sajwaj and Rincover do not resolve the issue of Danny's need for residential placement in favor of plaintiffs, particularly on a motion for summary judgment. Although Dr. Sajwaj advised against a home setting in his November, 1978, evaluation, he voiced a preference for a home-style setting over residential placement in his October, 1979, evaluation. In March, 1979, Dr. Rincover evaluated Danny and recommended constant supervision by trained personnel. He favored the local school system's initial plan for Danny for the 1979-80 school year which envisioned the training of Danny's parents so that they could care for Danny in the home in the evenings. While it is clear that Danny needs constant supervision, it is not so clear that this supervision can only come through a residential placement.[21]

REIMBURSEMENT UNDER THE EAHCA

Although plaintiffs are not entitled to partial summary judgment on their motion, the issue of their right to reimbursement for private educational expenses must be addressed because defendant's assert that they are not entitled thereto in any event. The local education defendants contend that damages are not recoverable under the EAHCA since the *de novo* review by a trial court provided by 20 U.S.C. § 1415(e)(2) is solely for the purpose of determining the proper educational

[21] Since plaintiffs are not entitled to partial summary judgment on their section 504 claim, the Court need not address the question of attorney's fees under 29 U.S.C. § 794a.

placement of the child.[22] These defendants note that courts have ruled that reimbursement is proper where exceptional circumstances exist, *i.e.*, school officials acted in bad faith, but assert that no exceptional circumstances exist here warranting reimbursement.

Although the decisions of the courts which have faced the issue of reimbursement under the EAHCA are split, the weight of authority has been that reimbursement for the cost of private education is available as a remedy when appropriate under the circumstances. *Department of Education v. Katherine D.*, 727 F.2d at 817 n.10 *and cases cited; cf., Parks v. Pavkovic*, 536 F.Supp. at 312 (if defendant failed to provide a free appropriate public education, then relief can only be in terms of damages); *Hurry v. Jones*, 560 F.Supp. 500, 508 (D.R.I. 1983) and *Matthews v. Amback*, 552 F.Supp. 1273, 1279 & n.7 (W.D.N.Y. 1982)(reimbursement is appropriate since the award merely places school system in position it would have been in if it had properly placed the child). The EAHCA was not intended to provide a damage remedy in the usual case. Rather, it was designed to provide the child with the appropriate educational placement through injunctive and declaratory relief. *Powell v. Defoe*, 699 F.2d 1078 (11th Cir. 1983); *Anderson v. Thompson*, 658 F.2d 1205 (7th Cir. 1981); *Christopher v. McDaniel*, 569 F.Supp. 291, 294 (N.D.Ga. 1983). The Court functions as the final decision-maker concerning parents' complaints about the appropriateness of their child's IEP. The Court's objective under the EAHCA is to arrive at the appropriate IEP. In *Anderson* the Seventh Circuit concluded that Congress did not intend the award of monetary damages under the EAHCA

[22] The Court need not decide whether the Eleventh Amendment bars recovery of damages under the EAHCA or section 504 against the State or its agencies because plaintiffs do not seek damages against those parties. This issue is unresolved in the courts. *See Department of Education v. Katherine D.*, 727 F.2d 809 (9th Cir. 1983)(state waived Eleventh Amendment protection by participation in EAHCA program); *Ciampa v. Massachusetts Rehabilitation Commission*, 718 F.2d 1 (1st Cir. 1983)(section 504 does not abrogate Eleventh Amendment immunity); *Miener v. Missouri*, 673 F.2d 969, 981-82 (8th Cir.), *cert. denied*, 74 L.Ed.2d 171 (1982)(Eleventh Amendment bars damage award under EAHCA); *Parks v. Pavkovic*, 536 F.Supp. 296 (N.D.Ill. 1982)(EAHCA abrogates Eleventh Amendment immunity).

in the absence of special circumstances making such relief appropriate. It noted that the legislative history is silent on this question and that section 1415(e)(2) provides that the trial court may grant "such relief as the court determines is appropriate." The court concluded that in most cases appropriate relief would be injunctive relief, since that would satisfy the purpose of the court's involvement under section 1415, a procedural safeguard ensuring proper placements and programs, and that a damage remedy would be inappropriate where the school system has made a good faith effort to properly place the child in question, an effort which is very difficult and easily subject to disagreement. *See Marvin H. v. Austin Independent School District,* 714 F.2d 1348 (5th Cir. 1983)(damages not proper where school officials have acted in good faith). If the child's health requires a private placement or if school officials have failed, acting in bad faith, to follow the procedures outlined by the EAHCA causing the parents to place the child in a private school, then reimbursement would be appropriate. *Anderson v. Thompson,* 658 F.2d at 1213-1214.

While an argument can be made by the defendants that the circumstances of this case do not warrant an award of reimbursement, that question cannot be resolved on a motion for summary judgment since it requires determining facts concerning, for example, the good faith compliance by school officials with the EAHCA and state law. Nevertheless, the local education defendants' Motion for Partial Summary Judgment on the Issue of Damages presents a compelling argument for denying plaintiffs recovery of reimbursement for the educational expenses at Walden House and the Grey home in Tennessee.

EDWARD RAY HUNT'S STANDING AS TRUSTEE

Edward Ray Hunt brought this action not only as Danny's representative but also as trustee of the Daniel Glen Hunt Fund. The evidence in the record and the statements of counsel in plaintiffs' brief and at oral argument indicate that the Fund paid all the educational expenses for which plaintiffs seek reimbursement. *See* footnote 14. The County School

Board contended that it is entitled to summary judgment on this claim for reimbursement because (1) the Fund is not a proper party to this action, and (2) sections 121a.301(b) and 84.34(c)(1) of 45 C.F.R. (1980), preclude relieving the Fund from its obligation to provide handicapped services to Danny Hunt. Plaintiffs retorted that the Board of Education offered no credible evidence to support these contentions.

Elementary to this claim for relief are findings that the Fund is a trust and that Edward Hunt is its trustee. The Court agrees with the plaintiffs' assumption and the Board of Education's deduction that the Fund was in fact a trust. An express trust is a fiduciary relationship between persons with respect to property which results from a manifestation of an intention to create it. *Sinclair v. Travis,* 231 N.C. 345, 57 S.E.2d 394 (1950). The essentials for trust creation, (1) sufficiency of words to raise a trust, (2) a definite subject matter, and (3) an ascertained object, *Wachovia Bank and Trust Co. v. Taylor,* 255 N.C. 122, 120 S.E.2d 588 (1961), were undisputably present in the Fund. However, no such consensus concerning the identity of the trustee exists. The Board of Education argues that Edward Hunt is not the trustee and, therefore, is not the real party in interest to pursue a claim in the name of the Fund. Plaintiffs attack this argument both procedurally and substantively. Both attacks fail.

Curiously, plaintiffs object on hearsay grounds to Exhibit No. 1 of the Deposition of Edward Ray Hunt, a newspaper article about the Fund. This article and another prior article (Edward Hunt Deposition, Exhibit No. 2) were produced by plaintiffs pursuant to a discovery request and were identified by Edward Hunt upon inquiry about formation of the Fund. Edward Hunt Deposition at 6-7. His testimony that the Fund originated with these articles (Edward Hunt Deposition at 7) casts serious doubt on the validity of the hearsay objection. Moreover, Edward Hunt's deposition testimony resolves the trustee issue independent of the newspaper articles.

The selection of a trustee, like most terms of a trust, originally rests with the settlor. The Fund did not function pursuant to a written trust instrument, and no evidence of a specific trustee appointment has been offered. However, the specific appointment and designation of a trustee is not necessary; the trustee may be designated by implication. *Ladies'*

Benevolent Society v. Orrell, 195 N.C. 405, 142 S.E. 493 (1928). Accepting as true the undisputed historical facts of the creation of the trust and acts done in furtherance of the trust purpose stated by Edward Hunt, it is clear that he has never been the trustee of the Fund.

The two principal methods of creating an *inter vivos* trust are declaration by a property owner that he holds property in trust and transfer of property by its owner to another person to hold in trust for a third person. R.Lee, *North Carolina Law of Trusts* at 2 (1978). The settlor of a trust created by declaration may be the trustee. *Ridge v. Bright,* 224 N.C. 345, 93 S.E.2d 607 (1956). The idea for the Fund originated with Shelba and Robert Forrest. They opened up a bank account in the name of "Danny Hunt Fund, c/o Shelba Forrest [sic]."[23] Edward Hunt Deposition at 7, Exhibit No. 3. With assistance from others, the Forrests solicited and collected constributions for the Fund and deposited them in the Fund account. As depositing trustees, the Forrests were creditors of the bank. *In Re Michal,* 273 N.C. 504, 160 S.E.2d 495 (1968). Only the Forrests had authority to make withdrawals from the account. Edward Hunt Deposition at 7, 10. While a bank withdrawal signature card is not conclusive of ownership, it is additional evidence that Edward Hunt was not the trustee. Legal title to the trust res lies with the trustee so that he may apply it to the benefit of the beneficiary. *Westcott v. First & Citizens National Bank,* 227 N.C. 39, _____ , 40 S.E.2d 461, 462-63 (1946). A trustee who lacks power of access to the res cannot carry out the necessary functions of the trust.

In addition to making deposits and withdrawals, Robert Forrest periodically prepared status reports on the Fund and delivered them to Edward Hunt. It reasonably and logically appears to the Court that these reports were submitted to Mr. Hunt as guardian of the minor beneficiary of the trust. Robert

[23] The materials before the Court imply but do not expressly state that the Forrests initially declared some of their own property to be held in trust for the benefit of Danny Hunt. However, this unanswered factual question is not material for even if in the unlikely event the Fund was technically created by each of contributors transferring their property to the Forrests for the benefit of Danny Hunt, the Court's consideration whether Edward Hunt was the trustee would not be affected.

Forrest also prepared and filed the Fiduciary Income Tax Returns for 1976-79. Edward Hunt Deposition at 11, 14, 63, Exhibits Nos. 3, 4. Finally, after filing the "final" tax return for the Fund, Forrest informed Edward Hunt that for all practical purposes the Fund was closed out. Edward Hunt Deposition, Exhibit No. 4. These accounting actions taken by Forrest are common duties of a trustee and consistent with other administrative functions he performed on behalf of the Fund.

The court recognizes that Edward and Ellen Hunt were involved in the creation and administration of the trust. Both state that they are co-trustees. Affidavits of Ellen Hunt and Edward Ray Hunt. However, these statements of an ultimate, conclusory fact are not binding, 10A C.Wright, A.Miller, & M.Kane, *Federal Practice and Procedure* § 2738 at 486-89 (1983), and are not supported by their depositions. Ellen Hunt understandably did not testify about the trustee issue since she is not named as trustee in the Amended Complaint. Edward Hunt characterized his limited role in the creation and administration of the trust. "It was agreed that I would not — I did not want it so I would be a recipient of these funds.... I did not want to get involved in the handling of such matters, and so they were deposited." Edward Hunt Deposition at 7. Contributions received by the Hunts were turned over to the Forrests for deposit. Edward Hunt Deposition at 13. *See North Carolina Law on Trusts* at 24 (delivery to a third person is sufficient to pass title to the intended trustee). Mr. Hunt considers himself trustee because he determined his son's needs and accordingly requested to Robert Forrest that the Fund provide for these needs. Edward Hunt Deposition at 9, 11, 13, 16. These requests were always honored. Edward Hunt Deposition at 16, 63. However, requests, advice, and solicitations to a trustee on behalf of a beneficiary are commonplace and proper. The ultimate decision to honor a request rests in the discretion of the trustee. The fact that Robert Forrest granted the requests attests only to the validity of the requests in serving the purpose of the trust. A trustee holds legal title to property and is held to equitable duties to deal with the property for the benefit of another person. *Westcott v. First Citizens National Bank*, 227 N.C. at _____, 40 S.E.2d at 462-63. The facts and circumstances surrounding the creation and administration of the

Fund plainly illustrate that Edward Hunt was never charged with the fiduciary duties of maintaining and applying property contributed to the Fund for the benefit of his son. Given his responsibilities as a parent, he wisely declined direct access to the Fund bank account and dealt with the Fund not as a trustee but as a guardian of its beneficiary. Consequently, Edward Hunt may not assert claims on behalf of the Fund.[24] Inasmuch as the monies contributed to the Fund were used for the purposes of the Fund, *i.e.*, Danny's education, and as the Hunts have not incurred educational expenses for Danny while he was in Tennessee, the Hunts can have no claim for reimbursement to them of the money paid out by the Fund. Since Edward Ray Hunt is not a trustee, he is not the real party in interest. Fed.R.Civ.P. 17.

INJUNCTIVE AND DECLARATORY RELIEF

Plaintiffs seek residential placement for Danny in the form of declaratory and injunctive relief. The EAHCA provides that a school system, a local education agency, must provide a residential placement if that is necessary for any handicapped child to benefit from educational instruction and related services. *Hessler v. State Board of Education,* 700 F.2d at 137; *William S. v. Gill,* 572 F.Supp. 509; 34 C.F.R.

[24] Assuming *arguendo* that the reimbursement claim was prosecuted by the proper party, at least three formidable barriers to reimbursement of the trust remain. First, it appears that the trust ceased to exist by the end of 1979 or at the latest in April, 1980, upon filing of the Fiduciary Tax Return. Edward Hunt Deposition at 12, Exhibit No. 4. A trust fails for lack of res. Second. the Fund as a trust likely does not have standing to bring an action under the Rehabilitation Act of 1973 or the Education of All Handicapped Children Act of 1975. Only handicapped individuals can sue under the Rehabilitation Act, 29 U.S.C. § 706(7), and aggrieved parties seeking judicial relief pursuant to the EAHCA are parents or guardians of a handicapped child. Finally, there may be merit to the Board of Education's argument that the implementing regulations for these statutes preclude reimbursement to the Fund. 45 C.F.R. §§ 84-34(c)(1) and 121(a) 301(b). The Fund was comprised of contributions given to benefit Danny Hunt and its funds were so spent. A post facto declaration that the defendants had concurrent obligations to provide educational services for Danny Hunt does not affect the fulfilled obligation of the Fund. Plaintiffs did not respond to this contention, which is well founded in facts showing that a primary purpose of the trust was to pay Danny's tuition at Walden House.

§ 300.13. Many lawsuits brought under the EAHCA center upon the issue of whether the child requires a private or public residential placement, which in turn generates the issue of whether the parents are entitled to reimbursement if they placed the child in a private school.[25] *See generally, Scokin v. State of Texas,* 723 F.2d 432; *Colin K. v. Schmidt,* 715 F.2d 1 (1st Cir. 1983); *Kruelle v. New Castle County School District,* 642 F.2d 687.

In this case the issue of whether to award such injunctive or declaratory relief is moot because Danny is and will be receiving residential placement services year-round. A representative of the local education defendants advised at the hearing in this matter that the Jamestown Elementary School program will continue. Danny's placement at the Gallimore home is now a regular budget item of the Area Program. Coordinated IEP's with which the Hunts are satisfied have been set up for Danny at Jamestown Elementary School and at the Gallimore home. While the defendants questioned Danny's need for a residential placement, they have nonetheless provided Danny with a detailed educational plan involving such a placement. If for any reason any defendant with authority decided to alter some facet of this program or placement, including terminating the residential placement, then such defendant would have to notify the Hunts. The Hunts could challenge such change administratively and in the courts

---

[25] A parent cannot unilaterally elect to place her child in a private school and recover tuition costs thereby incurred. *Rowe v. Henry County School Board,* 718 F.2d 115, 117 (4th Cir. 1983); *Marvin H. v. Austin Independent School District,* 714 F.2d 1348, 1353-54 (5th Cir. 1983); *Stemple v. Board of Education,* 623 F.2d 893 (4th Cir. 1980), *cert. denied,* 450 U.S. 911 (1981); 20 U.S.C. § 1415(e)(3). Section 1415(e)(3) provides that "[d]uring the pendency of any proceedings [under] this section, [unless the parties otherwise agree], the child shall remain in the then current educational placement of such child...." If an initial admission to a public school, the child will be placed in the public school program during the proceedings if the parents consent. 20 U.S.C. § 1415(e)(3). When the Hunts enrolled Danny at Walden House, the EAHCA had not been enacted and the regulations under section 504 (45 C.F.R. § 84.33(c)(3)) had not been promulgated. (Those regulations became effective on June 3, 1977). The plan for Danny's return to the Guilford County schools for the 1979-80 school year was an initial admission to which the Hunts did not have to consent.

and pending such proceedings Danny would remain in the residential placement setting. 20 U.S.C. § 1415(e)(3). Without the Hunts' consent Danny could not be removed from his current placement without ultimately a judicial determination that the residential placement is not necessary for him to benefit from educational services. *See* footnote 25. In light of the circumstances the Court concludes that the issue of injunctive and/or declaratory relief is moot, leaving at this point only the issue of damages under statutes other than the EAHCA for the defendants' alleged failure to provide such residential placement at an earlier date. *See Ciampa v. Massachusetts Rehabilitation Commission,* 718 F.2d at 3 (claims for declaratory and injunctive relief are moot in light of stipulation that plaintiff was receiving adequate services); *Hurry v. Jones,* 560 F.Supp. 500 (accommodation of child resolved injunctive relief claim).

SECTION 504

Section 504, 29 U.S.C. § 794, provides handicapped persons with an implied cause of action for relief for discrimination against them because of their handicap.[26] *Sanders v. Marquette Public Schools,* 561 F.Supp. at 1368; *Ruth Anne M. v. Alvin Independent School District,* 532 F.Supp. 460, 470 (S.D.Tex. 1982) *and cases cited.* A claim for relief under section 504 is stated when a plaintiff alleges "that a school district has *refused* to provide reasonable accommodations for the handicapped plaintiff to receive the full benefits of the school program" but not by merely alleging a disagreement over the correctness of an evaluation or services. *Marvin H. v. Austin Independent School District,* 714 F.2d 1348. In a reply brief to defendants' responses to their motion for partial summary judgment, plaintiffs state that the question under section 504, distinct from the EAHCA, is whether any defendant violated section 504 by excluding Danny from any educational program. Thus, the issue is not whether Danny was offered a public education which was appropriate," the issue under the EAHCA. In this case the distinction is tenuous because plaintiffs' complaint under the EAHCA (at least up to January, 1980) concerns the complete failure to offer

Danny an appropriate education, a residential placement, and thereby excluding him from the county's educational program.

The relationship between section 504 and the EAHCA has been the source of much judicial commentary because the former statute broadly concerns the rights of the handicapped to federally funded educational opportunities, a matter covered in much detail by the latter statute. In *Colin K. v. Schmidt,* 715 F.2d 1, the First Circuit noted the generally recognized proposition that the limited remedy provided by a specific statute, the EAHCA, should not be broadened by recourse to the provisions of a more general statute, section 504. The court determined that the plaintiff was only complaining of an error in judgment by school officials concerning the plaintiff's need for a residential placement and concluded that damages under section 504 were inappropriate because such relief was not appropriate under the EAHCA, the congressional intent being to limit plaintiff to prospective relief under the EAHCA. The idea that section 504 should not

---

[26] The regulations promulgated under section 504 provide for the termination by the Department of Health & Human Services (HHS) of federal funding of any program from which a qualified handicapped person has been excluded. 45 C.F.R. §§ 80.6 - .10 & 84.61 (the enforcement procedures promulgated under Title VI of the 1964 Civil Rights Act, 42 U.S.C. § 2000d). These regulations do not involve the affected handicapped person in the administrative proceeding and under the regulations HHS cannot order the payment of damages to that person. Since a claimant has little, if any, prospect for relief under these administrative procedures, he is not required to exhaust such procedures as an administrative remedy. *Meiner v. Missouri,* 673 F.2d 969; *Pushkin v. Regents,* 658 F.2d 1372 (10th Cir. 1981). However, when a claimant would bring an action under section 504 and the EAHCA, then he should first exhaust his administrative remedies under the EAHCA. *Hurry v. Jones,* 560 F.Supp. at 510; *Phipps v. New Hanover County Board of Education,* 551 F.Supp. at 735; *Calhoun v. Illinois State Board of Education,* 550 F.Supp. 796, 803 (N.D.Ill. 1982); *Davis v. Maine Endwell Central School District,* 542 F.Supp. 1257, 1263 (N.D.N.Y. 1982); 20 U.S.C. § 1415. Otherwise, section 504 would frustrate the efficacy of those congressionally mandated procedures. Plaintiffs have attempted to exhaust these administrative remedies, but the administrative hearing officer has failed to issue his decision despite the passage of many months. To require plaintiffs to await his decision would mean to ask them to engage in a futile exercise. The exhaustion requirement is satisfied where plaintiffs cannot effectively or meaningfully proceed further. *Parks v. Pavkovic,* 536 F.Supp. at 302.

be construed in a manner which frustrates Congress' intent in passing the EAHCA also finds expression in the view of courts that a claimant must exhaust EAHCA administrative remedies before bringing any action under the EAHCA and section 504. *See* footnote 27. The Court agrees that section 504 should not be construed in a manner at odds with the EAHCA.

Plaintiffs contend that the regulations promulgated under section 504 entitle Danny to a residential placement. Section 84.33(c)(3) of 45 C.F.R. does direct the placement of any child in a residential facility if that is necessary in order for the child to benefit from educational instruction. The validity of this regulation, as applied here, is subject to serious questioning in light of the Supreme Court's decision in *Southeastern Community College v. Davis,* 442 U.S. 397, 99 S.Ct. 2361, 60 L.Ed.2d 980 (1979), wherein that court rejected the contention that section 504 compelled the defendant school to undertake affirmative action to modify its program, an action which would be extensive or financially or administratively burdensome. "[N]either the language, purpose, nor history of section 504 reveals an intent to impose an affirmative action obligation on all recipients of federal funds. Accordingly, [the Supreme Court held] that even if HEW has attempted to create such an obligation itself, it lacks authority to do so." 442 U.S. at 411-412, 99 S.Ct. at _____ , 60 L.Ed.2d at 991-992.

The problem is where to draw the line between discrimination and affirmative action. *See Nelson v. Thornburgh,* 567 F.Supp. 369 (E.D.Pa. 1983)(must determine whether accommodation action would be excessive or burdensome on defendant). In *Colin K. v. Schmidt,* 715 F.2d 1, the court concluded that the failure to provide a residential placement was not a violation of section 504 since providing such an education service went beyond evenhanded treatment of qualified handicapped persons. *Accord, William S. v. Gill,* 572 F.Supp. 509. Providing such a service would entail the expenditure of substantial sums of money and provide the handicapped child with a service not provided the nonhandicapped. *Cf. Georgia Association of Retarded Citizens v. McDaniel,* 716 F.2d 1565 (providing education beyond standard 180 day school term would not amount to affirmative action); *Hurry*

v. Jones, 560 F.Supp. 500 (providing child with transportation to school would not be burdensome since only required a modification of existing school bus service); *Sanders v. Marquette Public Schools,* 561 F.Supp. 1361 (inference of no burden since defendant already providing services to handicapped); *see Dopico v. Goldschmidt,* 687 F.2d 644 (2d Cir. 1982)(accommodating the handicapped in public transportation does not require a substantial change in an existing program; issue is one of the amount of effort required and not whether any effort at all is required); *Phipps v. New Hanover County Board of Education,* 551 F.Supp. 732 (section 504 obliges school systems to provide handicapped children a free appropriate education; *Davis* invalidates affirmative action involving extensive modification of an existing program); *see also Tatro v. State of Texas,* 625 F.2d 557 (5th Cir. 1980)(catheterization did not require substantial adjustment, but issue of undue financial and administrative burden remanded).

In this case the local education defendants had provided Danny an education at the Sternberger School, assisted him toward his tuition at Walden House by means of the EEG's, and offered him a placement at Jamestown Elementary School upon his return to Guilford County for the 1979-80 school year. A school committee recommended in March, 1979, upon review of the Hunts' EEG application, that Danny should receive an EEG, because the school system could not offer him a placement within the system in the absence of contingent shock therapy facilities. Neither party offered evidence on how burdensome acquiring such facilities and personnel trained in such therapy would be. The matter of providing Danny a residential placement is another matter altogether. It is clear from the record that, with or without contingent shock therapy, the Hunts would not consent to Danny's return to the county school system except on a residential placement basis. The record shows that such a placement is expensive and administratively burdensome. Plaintiffs did not seek a modification of an existing program, but the inauguration of an entirely new program. Similarly, when the Hunts sought Danny's admission to the Kendall Center that facility was not organized to provide the residential services they sought. The center received their request and denied it.

The reorganization of the center in 1980 to provide permanent residential services to Danny was not a cheap or simple feat. The Murdoch Center of DHR admitted Danny in early 1976 for thirty days respite care to which Ellen Hunt agreed. The Murdoch Center was such a respite care facility, not a facility organized to receive Danny on a permanent residential basis. Absolutely no inference of discrimination against Danny because of his handicap arises from the evidence in the record, although the inference does arise that he received evenhanded treatment. Danny was not entitled to residential placement under section 504, because the record only shows that such educational service would be and was administratively and financially burdensome.

Assuming Danny was entitled to such placement prior to 1980 under section 504, there is no evidence giving rise to a reasonable, nonspeculative inference of intentional discrimination against him because of his handicap *(i.e.,* exclusion from programs because of his handicap) which could warrant an award of damages (whether or not the Fund paid for Danny's educational expenses in Tennessee). In order to receive damages under section 504 a plaintiff must show such intentional discrimination. *Marvin H. v. Austin Independent School District,* 714 F.2d at 1356-57. The remedies for violation of section 504 are the remedies set forth in Title VI of the Civil Rights Act of 1964. 29 U.S.C. § 794(a)(2). Damages are not available under Title VI in the absence of evidence of intentional discrimination. In *Guardians Association v. Civil Service Commission,* _____ U.S. _____ , 103 S.Ct. 3221, 77 L.Ed.2d 866 (1983) a 5-4 majority of the justices agreed that compensatory relief is unavailable under Title VI at least in the absence of evidence of discriminatory animus. The Supreme Court has not gone beyond stating that damages are available under section 504 upon a showing of intentional discrimination. *Consolidated Rail Corp. v. Darrone,* No. 82-862, slip op. at 5 (U.S. February 28, 1984).

Assuming damages could be recoverable for unintentional discrimination, under the undisputed facts here such relief is not proper. In discussing the availability of reimbursement under the EAHCA, the Court noted the widely accepted interpretation that such damages alone are recovera-

ble only upon a showing of special circumstances. Despite plaintiffs' efforts to distinguish a claim under section 504 which is entirely unique from their claims under the EAHCA, the Court perceives no substantive difference. Plaintiffs' essential claim is that the local education defendants (and the other defendants to the extent they might be responsible) acted unlawfully in denying Danny a residential placement. The school system had provided Danny a non-residential placement. Plaintiffs interpret the defendants' actions as an exclusion from educational opportunity. However, under the EAHCA these actions may be equally seen as the failure to provide Danny with a free appropriate public education. Allowing damages in excess of those available under the EAHCA, *i.e.*, reimbursement upon a showing of special circumstances, for a claim of wrongful exclusion from the benefits of the EAHCA would eviscerate the limitations on damages under the EAHCA, a statute Congress designed precisely to address the essential claim plaintiffs raise. *Department of Education v. Katherine D.*, 727 F.2d at 820-21; *Colin K. v. Schmidt,* 715 at 10; *Calhoun v. Illinois State Board of Education,* 550 F.Supp. at 804; *but see Meiner v. Missouri,* 673 F.2d 969 (general damages available under section 504). This interpretation is particularly impressive because the regulations under section 504 make compliance with the EAHCA and its procedures equivalent to compliance with those regulations. Hence, monetary relief under section 504, at least for unintentional violations, should be limited to reimbursement. This application of section 504 somewhat meshes with the determination by other courts that only equitable relief is available under section 504. *See Ruth Anne M. v. Alvin Independent School District,* 532 F.Supp. at 476. In light of the Court's previous conclusion that reimbursement under the EAHCA is not proper because the Fund paid all such expenses, there is no entitlement to reimbursement under section 504 as well.

SECTION 1983

Plaintiffs have alleged that defendants have denied them their rights to due process and equal protection in violation of

42 U.S.C. § 1983. A claim under section 1983 may be brought jointly with claims under the EAHCA, but not to assert a claim of violation of the EAHCA, 20 U.S.C. § 1415 specifically, because the EAHCA provides the exclusive remedy. An action under section 1983 cannot be maintained for relief available under the EAHCA. *McGovern v. Sullins,* 676 F.2d 98, 99 (4th Cir. 1982); *Hymes v. Harnett County Board of Education,* 664 F.2d 410, 413 (4th Cir. 1981); *accord Department of Education v. Katherine D.,* 727 F.2d at 820-21; *Powell v. Defore,* 699 F.2d at 1078; *Anderson v. Thompson,* 658 F.2d at 1216-17. Similarly, a claim of violation of section 504 cannot be brought under section 1983, because that would equally serve as an end run around the EAHCA and provide remedies broader than those available under section 504. If a party was free to bring a section 1983 action, then *federally mandated* state administrative remedies would be undercut. Although a party is not required to exhaust state administrative remedies prior to bringing a section 1983 action, *Patsy v. Board of Regents,* 457 U.S. 496, 102 S.Ct. 2557, 73 L.Ed.2d 172 (1982), such a scheme of relief as found in the EAHCA underscores the conclusion that Congress intended the remedies under the EAHCA to be exclusive for actions violative thereof.

It is somewhat difficult to disentangle plaintiffs' claims under section 1983 from their claims under the EAHCA. Plaintiffs alleged that the purpose of this lawsuit is to seek relief "for the... failure of defendant to provide Danny with a free, public education and residential services necessary and appropriate to meet his unique needs." From this allegation one would be compelled to conclude absent plaintiffs' allegation or citation of section 1983, that plaintiffs are proceeding under the EAHCA and/or section 504. The Fourth Circuit has instructed that in almost all respects the procedures of the EAHCA cover and prescribe the only route to relief anticipated by Congress where a plaintiff complains about the failure to provide an educational service needed by a covered handicapped person. *Hymes v. Harnett County Board of Education,* 664 F.2d at 413. The scope of review under the EAHCA covers not only challenges to actual placement decisions but also provides a cause of action challenging alleged deficiencies in the actual procedures implemented in com-

pliance with the EAHCA. *See Timms v. Metropolitan School District,* 718 F.2d 212, 216-17 (7th Cir. 1983)(EAHCA is exclusive and section 504 provides no remedy as to these two matters). To the extent a plaintiff would complain that officials failed to comply with the procedures set out in federal and state law, he would have a cause of action for that noncompliance under the EAHCA and could recover reimbursement. *Anderson v. Thompson,* 658 F.2d at 1214. Here, plaintiffs took advantage of administrative remedies available under state and federal law and exhausted those remedies. *Cf. Hymes v. Harnett County Board of Education,* 664 F.2d 410 (suit under section 1983 allowable where court cannot acquire jurisdiction under EAHCA to pass upon alleged illegality). At least as to those matters here arising after the EAHCA became binding on North Carolina school systems the Court has jurisdiction and can grant appropriate relief under the EAHCA. As to those matters such relief is exclusive in light of the comprehensive nature of the EAHCA's remedial scheme. *See Pennhurst State School and Hospital v. Halderman,* 451 U.S. 1, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981)(where the governing statute provides an exclusive remedy, section 1983 is not applicable).

To the extent that plaintiffs have section 1983 and constitutional claims concerning matters for which the EAHCA does not supply a form of relief, the undisputed facts deprive those claims of merit. Education is not a constitutionally guaranteed right. *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 93 S.Ct. 1278, 36 L.Ed.2d 16 (1973). The handicapped have not been identified as a suspect class. Therefore strict scrutiny is not applicable and defendants' actions must be sustained if rationally related to a legitimate state interest. *Smicka v. Ambach,* 555 F.Supp. 1227, 1235 (E.D.N.Y. 1983). Due process is violated when the state fails to treat a citizen in accordance with procedures specified by law. Negligent conduct, if state action, may give rise to a claim under section 1983. The plaintiff must prove that his injury resulted from that violation. *Carey v. Piphus,* 435 U.S. 247, 98 S.Ct. 1042, 55 L.Ed.2d (1978). In order to succeed on a claim of denial of rights under the Equal Protection clause, the plaintiff must prove intentional discrimination. The Court must also note that inasmuch as relief may be

available under section 1983, plaintiffs' claims directly under the Constitution should not be allowed. *Molina v. Richardson,* 578 F.2d 846 (9th Cir.), *cert. denied,* 439 U.S. 1048 (1978).

As previously noted, the evidence only gives rise to a reasonable inference that Danny was not the victim of intentional discrimination. The unrebutted reasons for denying Danny's admission to Kendall Center and Murdoch Center in 1976 are entirely legitimate — neither center was prepared to receive Danny for a permanent residential placement.[27] There is no evidence of any irregularity in handling the Hunts' requests for their son's admission to the facilities. When the Hunts voiced complaints about the decision of the local education defendants concerning Danny's placement upon his return for the 1979-80 school year, the defendants did not deny the Hunts any avenue for administrative relief under state law or make a sham of those avenues.

A factual issue exists as to whether, Douglas P. Magann, the County superintendent, in March, 1979, represented to the Hunts that the school system would begin paying the tuition at Walden House. The superintendent testified that he never represented that the school system would pay for the non-educational portion of the tuition. Apart from the statements of plaintiffs' counsel, there is no evidence concerning the effect of the superintendent's statements. Counsel indi-

---

[27] Events occurring in 1976 lie beyond the three year statute of limitations applicable to 42 U.S.C. § 1983. *Ocean Acres Limited Partnership v. Dare County Board of Health,* 707 F.2d 103 (4th Cir. 1983); N.C.Gen.Stat. § 1-52(5). Furthermore, the Hunts never approached the county government or Kendall Center again after early 1976, when they sought Danny's admission to Kendall Center, while Danny was in Tennessee. Clearly, plaintiffs can have no claim for damages against these defendants. September 29, 1977, falls three years prior to the bringing of this lawsuit.

Section 504, like 42 U.S.C. § 1983, lacks a statutorily prescribed statute of limitations. The same three year statute of limitations should apply. Section 1-52(5), N.C.Gen.Stat., provides a three year limitation period for injuries to the rights of another. This state law limitation period is analogous to section 504 which establishes a right of handicapped persons. *Cf. Scokin v. Texas,* 723 F.2d 432; *Ruth Anne M. v. Alvin Independent School District,* 532 F.Supp. 460. No party could have any liability under the EAHCA prior to September, 1978, because the statute did not become applicable to North Carolina until that time.

cated that the Hunts terminated certain administrative proceedings pending at the time of their conversation with the superintendent and that these proceedings dealt with their request for public funding of Danny's tuition at Walden House or another residential placement. Defense counsel stated that this administrative proceeding dealt only with the Hunts' complaint that the school system had not approved an EEG for the 1978-79 school year.

The evidence only shows that the plaintiffs have not been damaged by this interlude with the superintendent. The superintendent testified that he had no authority to make a binding promise to pay any portion of Danny's tuition at Walden House. Only the local school board could make such a financial commitment. Plaintiffs did not rebut this testimony with other evidence. No harm resulted from the termination of the administrative proceedings because, one, the Hunts subsequently received an EEG, and, two, the local school system subsequently, upon considering whether Danny needed a residential placement, concluded against any residential placement as part of Danny's IEP. In any event, plaintiffs' remedy for the superintendent's conduct lies with the EAHCA and not section 1983.

DEVELOPMENTALLY DISABLED ASSISTANCE AND BILL OF RIGHTS ACT

Plaintiffs alleged a claim under the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. §§ 6001-81. Plaintiffs' Reply Memorandum at ¶ IVE (August 18, 1983)), in view of the Supreme Court's opinion in *Pennhurst State School and Hospital v. Halderman,* 451 U.S. 1, 101 S.Ct. 1531, 67 L.Ed.2d 694, wherein that court stated that the act establishes a national health care policy for the handicapped, but does not oblige the states to provide certain kinds of treatment at their own expense.

LOCAL NON-EDUCATION DEFENDANTS AND DHR

The local non-education defendants seek summary judg-

ment as to plaintiffs' complaint and the crossclaim of the county board of education. The Court need only briefly address this motion because it has already determined that these defendants are not liable for any monetary damages to plaintiffs and because the issue of injunctive or declaratory relief is moot. The evidence contradicts any claim that these defendants committed any equal protection or due process violation. Apart from the Kendall Center matter in 1976, which falls outside the three year limitations period, the record is devoid of any contact by plaintiffs with the center or otherwise with the county commissioners. Their contact in 1980 occurred as part of the process of revamping Kendall Center so it could receive Danny, a process the county commissioners cooperated with. Under these facts surely plaintiffs cannot claim that the local non-education defendants discriminated against Danny because of his handicap.

The local non-education defendants and DHR contend that the EAHCA and state law places no responsibility on them to provide Danny with a free appropriate public education. Under section 115c-140.1, N.C.Gen.Stat. (effective July 1, 1981), the local board of education must bear the cost of the free appropriate public education for handicapped children in group homes and the state board must reimburse the local board out of state and federal funds appropriated for children with special needs. As previously noted the state board of education is the body responsible for ensuring that local education agencies carry out their responsibilities under these laws. 20 U.S.C. § 1412(6); 45 C.F.R. § 121a.600 and Comment; N.C.Gen.Stat. §§ 115c-106(b)(viii) & -110(a). In carrying out this responsibility, the state board's authority extends over DHR and over the county government to the extent they may provide "special education services or having children with special needs in [their] care, custody, management, jurisdiction, control, or programs...." N.C.Gen.Stat. § 115c-110(a). Under state law DHR's status is equivalent to that of a local school administrative unit under the state board. The Court need not decide if Danny's current placement at the Gallimore Home directly or indirectly places him under the jurisdiction, control, care, or management of these defendants. The issue of injunctive or declaratory relief is moot and the state board of education must act as Danny's "watch-

dog."

PENDENT CLAIMS

In the Amended Complaint plaintiffs alleged that the denial of a free appropriate public education violated Article 45 of Chapter 115 of the North Carolina General Statutes and sections 5 and 7 of Article IX of the State Constitution. The above-noted statutory provision, which has been recodified at Article 9 of Chapter 115c, N.C.Gen.Stat. §§ 115C-106 - - 145, was the State's response to the requirements of the EAHCA. The constitutional provisions concern, respectively, the state board's duty to supervise the public school system and educational funds except the funds covered by section 7 and the exclusive use of the county school fund and fines collected in the counties for maintaining free public schools. The resolution of plaintiffs' EAHCA claim together with the mootness of the injunctive and declaratory relief issue resolves plaintiffs' claims under state law. The parties did not address whatever pendent claims for relief plaintiffs might have under the State Constitution. There is no evidence that any moneys designated by section 5 or section 7 for use in maintaining public schools were used for any other purpose. If injunctive relief was appropriate, then the state board's duties under section 5 would be of some significance in this action along with more specific statutory provisions. In summary, the Court concludes that plaintiffs' pendent claims have been resolved.

CONCLUSION

The party plaintiffs with standing are Danny and his parents, but Edward Ray Hunt cannot proceed in this action as a trustee of the Danny Hunt Fund. The issue of injunctive and declaratory relief is moot, leaving only the question of damages for alleged violations of the Fourteenth Amendment and 42 U.S.C. § 1983 and denial of an appropriate free public education in a residential placement in violation of section 504, the EAHCA and corresponding state law, the Develop-

mentally Disabled Assistance and Bill of Rights Act, and state law. The plaintiffs have abandoned their claim under the Developmentally Disabled Assistance and Bill of Rights Act. Danny was not entitled to a residential placement under section 504 and there is no evidence of intentional discrimination warranting damages under section 504 or for any alleged equal protection violation. To the extent that the EAHCA and section 504 do not displace any cause of action by plaintiffs under section 1983, the record shows the definite absence of a section 1983 violation. The extent of damages which the plaintiffs with standing could possibly recover under the EAHCA is reimbursement for Danny's education expenses in Tennessee. The plaintiffs are not entitled to such reimbursement because the trust fund paid these expenses.

While the Court extends its sympathy to Danny and his parents, it would violate the oath of office to allow sympathy to subvert its interpretation of the governing statutes. Plaintiffs are fortunate to have such good neighbors as the Forrests and the tremendous generosity of the citizens of Guilford County and surrounding counties. We should all be grateful that Danny is now enrolled in a program with which his parents are well pleased. Also, so long as Danny is covered by the EAHCA, it is a program from which he cannot be removed over his parents' objections unless it is judicially determined that such placement is no longer necessary for him to benefit from the educational services.

IT IS, THEREFORE, ORDERED that the local education defendants' motion for partial summary judgment on the issue of damages be, and the same hereby is, GRANTED.

IT IS FURTHER ORDERED that the cross-motions for partial summary judgment of the state and local education defendants be, and the same hereby are, GRANTED on the issue of damages.

IT IS ALSO ORDERED that plaintiffs' motion for partial summary judgment be, and the same hereby is, DENIED.

IT IS ORDERED that the local non-education defendants' motion for summary judgment be, and the same hereby is, GRANTED to the extent that these defendants are not liable to plaintiffs for any monetary damages.

IT IS ORDERED that DHR'S Motion for Summary Judgment is DENIED AS MOOT.

FINALLY, IT IS ORDERED that this action be, and hereby is, DISMISSED because the only remaining issue, plaintiffs' entitlement to injunctive or declaratory relief, is moot.

A Judgment will be entered accordingly.

HIRAM H. WARD
United States District Judge

June 6, 1984.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

DANIEL GLEN HUNT. by and through his father and next friend, EDWARD RAY HUNT, and EDWARD RAY HUNT and ELLEN HUNT, and EDWARD RAY HUNT, Trustee of the Daniel Glen Hunt Fund, *Plaintiffs,*	)
vs	)
A. CRAIG PHILLIPS, State Superintendent of Public Instruction, State of North Carolina; THE NORTH CAROLINA STATE BOARD OF EDUCATION AND DAVID BRUTON, Chairman; JOHN A. WILLIAMS; State Budget Officer, State of North Carolina; J.A. PORTER, Controller, Department of Public Instruction, State of North Carolina; DOUGLAS MAGANN, Superintendent of Public Instruction, Guilford County, State of North Carolina; GUILFORD COUNTY BOARD OF EDUCATION and EVON DEAN, Chairman; GUILFORD COUNTY BOARD OF COMMISSIONERS and FORREST CAMPBELL, Chairman, *Defendants.*	) MOTION FOR PRELIMINARY INJUNCTION AND AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF AND FOR DAMAGES FOR DEPRIVATION OF FEDERAL CIVIL RIGHTS

* * * *

IV. STATEMENT OF FACTS

16. Plaintiff, Daniel Glen Hunt, is a 13-year old boy who has been diagnosed as being severely autistic, severely retarded with undeveloped language skills, profoundly delayed adaptive skills, limited social skills, self-injurious behavior, self-stimulatory behavior, oppositional negativistic behavior (tantrums) culminating in unsocialized aggression and other handicaps. Because of these conditions, he requires 24-hour behavioral, educational and treatment supervision by trained personnel.

* * * *

21. During the early months of 1976, Danny was in such extreme states of hyperactivity and self-abusive actions that parent plaintiffs sought, as a last resort, the commitment of Danny to the Murdoch Center, a residential retardation facility in Butner, North Carolina, and alternatively to the Kendall Center, a respite residential facility for handicapped children in Guilford County, North Carolina operated by defendant, Guilford County Board of Commissioners. In both instances Danny was denied entrance into said facilities for services. No other educational and residential services were available and defendants, the Guilford County Board of Education, the Department of Public Instruction, and the Guilford County Board of Commissioners would not provide the necessary services for Danny thereby denying an equal opportunity to education and discrimination against Danny solely because of his handicapping condition. Said actions by defendants deprived plaintiffs their rights under federal and state law.

22. Having been deprived by defendants of appropriate residential and educational services in Guilford County or North Carolina, plaintiffs eventually located appropriate services for Danny in Nashville, Tenneessee, at a facility identified as the Walden House. Upon proper application, defendants, Guilford County School System and the State Board of Public Instruction approved the placement of Danny at Walden House. Both defendants admitted that there were no services available for Danny in North Carolina, and that the services being provided for him in Nashville, Tennessee, were appropriate for his needs. The defendants did not assume the

burden of paying the total cost of education and care of Danny while at the private facility thereby denying plaintiffs an equal educational opportunity and a free, appropriate education for Danny.

* * * *

29. On January 31, 1979, parent plaintiffs requested in writing a due process hearing regarding Danny. The hearing was scheduled for March 6, 1979, and then delayed until March 19, 1979, when an oral pre-administrative hearing agreement was entered into between Dr. Douglas P. Magann, Superintendent of Guilford County Schools, and the parent plaintiffs in which the parent plaintiffs were informed and believed that the defendant Guilford County School System agreed to pay the total cost of care for Danny at Walden House.

* * * *

31. During the spring of 1979, the Hunts inquired of the Guilford County School System why all of Danny's costs at Walden House were not being paid. They learned that the only amount actually being paid for Danny's cost of education and related residential services was a $2,000 educational expense grant authorized by defendant, Department of Public Instruction.

32. The Hunts appealed time and time again for total financial assistance from the defendants because their funds had been depleted to less than one month's worth of expenses. They further placed the Guilford County School System on notice that because of the lack of financial support at the Walden House the possibility of Danny being returned to the Guilford County community without notice was very likely. The parent plaintiffs pleaded with every agency and department in education and health care services in North Carolina, including all defendants, that free appropriate services for Danny be provided. The Guilford County School System provided an inappropriate individual education plan (hereinafter "IEP"). The IEP did not provide for any residential services, did not provide for 24-hour-per-day care and did not provide for a 12-month, 365-day-per-year program, all of which plaintiffs contend are necessary to educate and habilitate Danny.

* * * *

35. Parent plaintiffs requested a reopening of the administrative hearing of March, 1979, making a formal request for a fair hearing on the issue of expenses and the sufficiency of Danny's Individual Education Plan, namely: residential placement, and 24-hour-per-day, 365 day educational services pursuant to 45 C.F.R., §121a. et. seq. The hearing began on October 26, 1979. At the conclusion of some of the evidence, the hearing officer entered a continuance order. He found: that other agencies within the County should be approached regarding support and assistance both financially and programmatically in order to assist the Guilford County School System in meeting the needs of Danny; that the Department of Public Instruction and the Department of Human Resources, two state agencies, should also be approached as to their responsibilities in this particular case; and that the due process hearing was not the forum in which the issue of reimbursement of expenses was to be heard.

36. During the months of November and December, 1979, plaintiffs met with the defendants or the representatives of defendants and numerous other local and state agencies in order to pursue their request for appropriate services for Danny. After the agencies responded to questions regarding the services and financial support of Danny, it was concluded that all agencies represented at the meeting agreed that Danny should be served and the service should be free under federal and state legal law [sic]. None of the agencies would commit themselves to the primary role of implementing said services or paying for the costs of said services.

* * * *

38. At the November 26, 1979, meeting, all of the representatives of agencies identified in preceding paragraphs above including all defendants or their representatives, again considered who would take responsibility for financial and program services to meet Danny's needs. Possibilities discussed for residential placement were the Triad Home for Autistic Children, out-of-state private residential placement funded with Title XX monies, state institutionalizational programs specially designed to meet Danny's needs, or a reconsideration of a placement in the local respite care center called Kendall. The possibilities were addressed, and each alterna-

tive was found to be either inappropriate or unavailable for Danny....

* * * *

42. The continuance order of the due process hearing officer above was never finalized. The defendant Guilford County School System notified the caretaker of Danny that funds were not available for the cost of care in January, 1980. Danny suffered irreparable injury as a result of defendants' failure to maintain him in the *then current placement* until resolution of administrative and judicial process in direct violation of 45 C.F.R. §121a.513 (a). Upon his forced return, no residential services were going to be available, no educational services were going to be available, and no agencies were going to be prepared to take responsibility for Danny. The Hunts, through counsel, prepared for the initiation of a temporary restraining order, a preliminary injunction and other actions to be immediately addressed in the Federal District Court because of the potential, irreparable harm that was certain to befall Danny upon his return.

43. As required by the Federal Rules of Civil Procedure, a final effort was arranged for the parties to meet together to possibly agree to coordinate arrangements instead of pursuing a temporary restraining order. The Guilford County School System, The Department of Human Resources, The Guilford County Commissioners, The Department of Social Services, The Area Mental Health, Mental Retardation and Substance Abuse Authority, and the petitioners agreed that since the temporary emergency situation required all the agencies involved to assist in whatever way they could, without inference to or admission of their responsibility for delivering services to Danny, then each agency would deliver service requirements necessary to meet Danny's needs in order to resolve the then immediate emergency problem and allow time in which the administrative hearing, possible appeal and judicial review could be continued and concluded.

44. The emergency situation was overcome, and conferences by agency representatives concluded with no adequate remedy. No negotiations were successful in identifying which defendant would take the responsibility for providing educational and residential services to Danny as required by State and Federal Law. No negotiations were successful in identify-

ing which defendant would take the financial responsibility for the cost of Danny's care as required under Federal and State law. The administrative hearing was reconvened on February 22, 1980. At the conclusion of the administrative hearing, attorneys for the parties agreed with the hearing officer that proposed findings of fact and conclusions of law, and the proposed Order were to be filed no later than June 1, 1980. No extensions of time nor continuances were requested, nor were negotiations continuing between the parties after June 1, 1980, and all required filings were made by all parties in a timely fashion.

45. Since June 1, 1980, no Order has been rendered by the administrative hearing officer in violation of administrative procedure, statutory law, and the EHCA. Defendants have denied plaintiffs their constitutional rights by denying them due process and equal protection in violation of the Fourteenth Amendment. The administrative process in the State of North Carolina is one in which to continue to pursue administrative remedies in light of the denial of due process is an impossibility.

* * * *

V. CLAIMS FOR RELIEF

First Claim for Relief

52. The acts, omissions, practices and policies of each and all of the defendants acting under color of state law, regulation and rule were arbitrary, capricious and unreasonable, and intended to and did deprive plaintiffs of their rights to equal protection under the law, to procedural due process and to substantive due process all being in violation of the Constitution of the United States, the Civil Rights Act of 1871 (42 U.S.C. 1983), and the Civil Rights Act of 1964 (42 U.S.C. 2000(d) et. seq).

Second Claim for Relief

* * * *

54. Plaintiffs respectfully request by this complaint that the issues before the administrative hearing officer be consolidated with this one complaint so that all of the matters may

be disposed of in one action before the Court. To continue to pursue the administrative remedies in light of the denial of due process is impossible.

* * * *

Ninth Claim for Relief

* * * *

74. Because of the aforesaid illegal and oppressive acts and conduct of defendants, plaintiffs have been compelled to employ counsel to prosecute this action, and will be obligated to pay therefor reasonable attorney's fees.

75. Plaintiffs are entitled to recover from defendants reasonable attorney's fees pursuant to 42 U.S.C. §1988.

WHEREFORE, plaintiffs pray the Court:

1. For an Order of the Court declaring that the plaintiffs have been and are being denied due process and equal protection under the Fifth and Fourteenth Amendments of the Constitution of the United States by defendants in that a timely decision by the due process hearing officer was never rendered and has yet to be rendered.

* * * *

6. That this Court enter an Order providing plaintiffs with reimbursement of expenses in the amount of $65,000.00, and awarding plaintiffs permanent damage in the amount of $100,000.00 to which plaintiffs are entitled to recover from defendants as hereinabove alleged.

7. That this Court enter an Order requiring defendants to pay plaintiffs a reasonable amount for attorney's fees for the services rendered and to be rendered by plaintiffs' counsel in these proceedings as provided by 2 U.S.C. 1988.

8. That this Court provide such other and further relief as to the Court shall seem just and proper.

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION
C-80-519-G

DANIEL GLEN HUNT, by and through his father and next friend, EDWARD RAY HUNT, and EDWARD RAY HUNT and ELLEN HUNT, and EDWARD RAY HUNT, Trustee of the Daniel Glen Hunt Fund, *Plaintiffs*	)	
vs.	)	ANSWER AND CROSSCLAIMS
A. CRAIG PHILLIPS, State Superintendent of Public Instruction, State of North Carolina, et al., *Defendants.*	)	

Defendants Douglas Magann, Guilford County Board of Education and Evon Dean, answering the Complaint of Plaintiffs, say:

* * * *

IV. STATEMENT OF FACTS

16. It is admitted that Plaintiff, Daniel Glen Hunt, is a thirteen (13) year old boy diagnosed as being severely autistic and severely retarded. The remaining allegations of paragraph 16 are denied.

* * * *

21. Paragraph 21 is denied.

22. It is admitted that Defendants approved an educational expense grant for Danny Hunt for the years 1976, 77, 78, and 79, pursuant to North Carolina G.S. § 115-315.7 *et seq*. The remaining allegations of paragraph 22 are denied.

* * * *

29. It is admitted that a request for a due process hearing was made on January 31, 1979, and that the hearing was scheduled for March 6, 1979, and continued, with the consent of all parties, until March 19, 1979. The remaining allegations of paragraph 29 are denied.

* * * *

31. The first sentence of paragraph 31 is denied. It is admitted that the only amount actually paid for Danny's education was a Two Thousand ($2,000.00) Dollar educational expense grant.

32. Paragraph 32 is denied.

* * * *

35. Answering paragraph 35, it is admitted that the requested due process hearing began on October 26, 1979. The remaining allegations of paragraph 35 are denied for the reason that the order entered by the hearing officer speaks for itself.

36. Answering paragraph 36, it is admitted that meetings took place during the months of November and December, 1979; it was the position of these Defendants that a free appropriate public education could be provided Danny at the special class for multi-handicapped students at Jamestown Elementary School, the elements of which are set forth in further detail in the FIRST DEFENSE, and a separate residential placement at Kendall Center, a residential center operated by the Department of Human Resources and Guilford County under a separate individual educational program.

* * * *

38. Paragraph 38 is denied.

* * * *

42. The allegations of paragraph 42 are denied. In further answer, these Defendants allege that Danny Hunt's educational placement was changed as a result of the change in program at Walden House, and that there was in January, 1980, no "then current" placement available for Danny Hunt. In addition, the caretaker for Danny Hunt, Dave Morgan, testified at the due process hearing, under oath, that he was unable and unwilling to serve as Danny's caretaker. The emergency situation was caused not by the action of these Defendants, but rather by the total refusal of the parents of

Danny Hunt to cooperate in any way with the responsible officials in Guilford County in providing a reasonable accommodation to meet Danny Hunt's needs in Guilford County.

43. Paragraph 43 is admitted.

44. Answering paragraph 44, it is admitted that the administrative hearing was reconvened on February 22, 1980, and that the hearing officer directed that proposed findings of fact and conclusions of law be filed no later than June 1, 1980. The remaining allegations of paragraph 44 are denied.

45. Answering paragraph 45, it is admitted that no order has been rendered by the administrative hearing officer; the remaining allegations of paragraph 45 are denied. These Defendants further allege that Plaintiffs have waived any right to complain of the lack of decision by the hearing officer and that by their silence up until the time they filed this lawsuit they are estopped from now complaining that the hearing officer has not acted.

* * * *

V. CLAIMS FOR RELIEF

The allegations of paragraphs 51 through 75, purporting to set out nine separate claims for relief, are denied.

Having answered the complaint, these Defendants allege by way of further defense:

* * * *

THIRD DEFENSE

Plaintiffs' complaint fails to state a claim upon which relief can be granted.

FOURTH DEFENSE

This court lacks jurisdiction over the subject matter of this action for the reason that Plaintiffs have failed to exhaust their administrative remedies as required by the Education for All Handicapped Children Act of 1975, 20 U.S.C. § 1415 *et seq.*, and for the reason that this is not an appeal of a decision by an administrative hearing officer pursuant to said statute.

* * * *

SEVENTH DEFENSE

To the extent that Plaintiffs purport to state a claim for deprivation of any procedural rights created by the Education for All Handicapped Act, these Defendants allege upon information belief that the adult Plaintiffs had available to them many opportunities to obtain a decision from the hearing officer and to continue the administrative process, but the Plaintiffs elected rather to sit quietly and do nothing. The Plaintiffs never contacted the hearing officer to demand that a decision be rendered, or to determine why the decision had not been rendered, nor did they complain about the lack of a decision to these defendants. Plaintiffs have therefore waived any right they may have had to complain of the failure of the hearing officer to render a decision promptly.

WHEREFORE, having fully answered the complaint of the plaintiff, the Defendants pray the Court that:

1. The action of the Plaintiffs be dismissed and that they be taxed with the costs of this action.

* * * *

DOUGLAS, RAVENEL, HARDY,
CRIHFIELD & BULLOCK
110 Commerce Place,
Post Office Box 419
Greensboro, North Carolina 27402
Telephone: (919) 378-0580

By: /s/_____
John W. Hardy

By: /s/_____
James W. Lung

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
GREENSBORO DIVISION

DANIEL GLEN HUNT, by and through his father and next friend, EDWARD RAY HUNT, and EDWARD RAY HUNT and ELLEN HUNT, and EDWARD RAY HUNT, Trustee of the Daniel Glen Hunt Fund, *Plaintiffs*	)	
vs.	)	MOTION FOR PARTIAL SUMMARY OF JUDGMENT
CRAIG PHILLIPS, State Superintendent of Public Instruction, State of North Carolina, et al., *Defendants.*	)	

Plaintiffs, pursuant to Rule 56(a), Federal Rules of Civil Procedure, hereby move for partial summary judgment against Defendants on the following issues of liability:

I. In school years 1976-1980, did defendants violate 20 U.S.C. Sec. 1411-1420, by failing to provide Danny Hunt with a free, appropriate, public education?

II. In all relevant school years, did defendants violate 20 U.S.C. Sec. 1411-1420 and 29 U.S.C. Sec. 794, by limiting educational services for Danny Hunt to 180 days of the year?

III. From January 1976 through January 1980, did defendants violate 29 U.S.C. Sec. 794 by excluding Danny Hunt from their educational programs, which receive federal financial assistance, solely because of his autism?

Plaintiffs further move the Court for a declaratory judgment based upon the foregoing findings of liability, as follows:

I. Are plaintiffs entitled to reimbursement for the cost

of Danny Hunt's education during the years that defendants, in violation of 29 U.S.C. Sec. 794 and 20 U.S.C. Sec. 1411-1420, refused to pay for that education?

In support of this motion, Plaintiffs show unto the Court that as to these issues of liability and declaratory judgment, there are no genuine issues as to any material fact and plaintiffs are entitled to judgment as a matter of law. Specifically in support of this motion, Plaintiffs tender unto the Court:

(a) The affidavit of Edward Ray and Eleanor Hunt;

(b) The affidavit of Arnold Rincover;

(c) The affidavit of Al Singer;

(d) Other affidavits, answers to interrogatories, and admissions, as more specifically identified in the attached brief; and

(e) Plaintiffs' brief in support of partial summary judgment.

WHEREFORE, Plaintiffs pray that the Court award summary judgment on the three issues of liability and the single declaratory judgment issue identified above, reserving all other issues raised by the pleadings and specifically the issue of damages for trial.

This the 18th day of May, 1983.

/s/_____
A. Frank Johns
Attorney for Plaintiffs

/s/_____
Hans Christian Linnartz
Attorney for Plaintiffs

OF COUNSEL:

BOOTH, HARRINGTON, JOHNS & CAMPBELL
239 North Edgeworth Street
Post Office Box 3585
Greensboro, North Carolina 27402
(919) 275-9567

UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF NORTH CAROLINA

DANIEL GLEN HUNT, etc., et al.,	)	NO. C-80-519-G
	)	RESPONSE TO
Plaintiffs,	)	PLAINTIFF'S MOTION
v.	)	FOR PARTIAL
	)	SUMMARY JUDGMENT
A. CRAIG PHILLIPS, etc., et al.,	)	AND CROSS-MOTION
	)	FOR PARTIAL
Defendants.	)	SUMMARY JUDGMENT

Defendants, Guilford County Board of Education and other Defendants associated with the Guilford County Board of Education respectfully move the Court pursuant to Rule 56 of the Federal Rules of Civil Procedure for partial summary judgment against Plaintiffs with respect to the issues raised in their Motion for Partial Summary Judgment, or in the alternative that Plaintiffs' Motion should be denied, and respectfully show the Court:

1. Plaintiffs' claim for reimbursement should be dismissed because there is no cause of action for reimbursement under the EAHCA.

2. The claims of Plaintiffs raised under § 504 of the Rehabilitation Act, 29 U.S.C. §794, do not present a justiciable controversy for the reason that the only remedy available to Plaintiffs for the years in question would be money damages, and there is no cause of action for money damages available under §504 of the Rehabilitation Act.

3. There is no cause of action available to Plaintiffs under the Rehabilitation Act for the further reason that the Rehabilitation Act is an anti-discrimination statute which does not create substantive rights to affirmative action on the part of this Defendant. Further, because the Education for All Handicapped Children Act of 1975, 20 U.S.C. §1401 *et seq.* (EAHCA), is a specific and detailed congressional statement of policy with regard to the rights of handicapped children to public education which sets out detailed and extensive sub-

stantive and procedural rights with regard to the provision of education and related services to handicapped children. This statute, enacted in 1975, supercedes any applicability of the Rehabilitation Act to public elementary and secondary education to the extent those statutes are co-extensive.

4. Plaintiffs' claim for reimbursement expenses prior to October 1, 1977 are barred by the Statute of Limitations.

5. Plaintiffs are not entitled to recover any amounts expended by the "Danny Hunt Fund" prior to September 1, 1978, the effective date of the Education for All Handicapped Children Act.

6. Plaintiffs failed to exhaust their administrative remedies and thus are barred from recovering reimbursement for the years 1975-76, 1976-77, and 1977-78.

7. Danny Hunt was placed by his parents in Walden House unilaterally and for reasons not directly related to his handicapping conditions and these Defendants therefore cannot be held responsible for the cost of that placement.

8. Any cause of action based upon an alleged inflexible refusal to fund a placement in excess of 180 days is moot because the record clearly shows that Danny Hunt has received 365 day per year, 24 hour per day, education and related services on a continuous basis since his parents placed him at Walden House until the present time. Plaintiffs lack standing to challenge an alleged policy which obviously is not applied to them.

Wherefore, these Defendants move the court that Plaintiffs' Motion for Partial Summary Judgment be denied and that Defendants be granted Partial Summary Judgment on the question of liability.

This 20th day of July, 1983.

Attorneys for Guilford County Board of Education

/s/
James W. Lung

/s/
John W. Hardy

UNITED STATES DISTRICT COURT
FOR THE
MIDDLE DISTRICT OF NORTH CAROLINA

DANIEL GLEN HUNT,	)	NO. C-80-519-G
	)	MOTION FOR
v.	)	PARTIAL SUMMARY
	)	JUDGMENT ON THE
A. CRAIG PHILLIPS, ET AL.	)	ISSUE OF DAMAGES

Defendants, Guilford County Board of Education and other Defendants associated with the Guilford County Board of Education respectfully move the Court pursuant to Rule 56 of the Federal Rules of Civil Procedure for partial summary judgment against Edward Ray Hunt in his alleged status as "Trustee" and against Edward Ray Hunt and Ellen Hunt individually and respectfully show the court:

1. The claims of Edward Ray Hunt and Ellen Hunt for damages for the alleged denial of the minor plaintiff of a free appropriate public education should be dismissed for the reason that the depositions taken of Edward Ray and Ellen Hunt conclusively show that all of the expenses incurred for the education, treatment and habilitation of the minor plaintiff during the years 1976-1981 were paid by either the "Danny Hunt Fund" or were reimbursed to the parents of the minor plaintiff by the "Danny Hunt Fund" or Social Security Supplemental Security Income payments. Neither of the parents of Danny Hunt have suffered any legally cognizable damages from the alleged acts of these defendants in denying Danny Hunt a free appropriate public education.

2. The claim of Edward Ray Hunt as alleged "Trustee" of the "Danny Hunt Fund" should be dismissed as the depositions of Edward Ray Hunt and Ellen Hunt conclusively show that Edward Ray Hunt is not a trustee of the "Danny Hunt Fund".

Wherefore, these Defendants move the court that Defendants be granted Partial Summary Judgment on the question of damages and that all claims of plaintiffs for damages be dismissed with prejudice.

This 14th day of November, 1983.

Attorneys for Guilford County Board of Education

/s/
James W. Lung

/s/
John W. Hardy

OF COUNSEL:

DOUGLAS, RAVENEL, HARDY, CRIHFIELD & LUNG
Post Office Box 419, 110 Commerce Place
Greensboro, North Carolina 27402
TELEPHONE (919) 378-0580

20 U.S.C. § 1415. Procedural safeguards.

Establishment and maintenance

(a) Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that handicapped children and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

Required procedures; hearing

(b)(1) The procedures required by this section shall include, but shall not be limited to —

(A) an opportunity for the parents or guardian of a handicapped child to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, available, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit —

(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully informs the parents or guardian, in the parents' or guardian's native language, unless it clearly is

not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

Review of local decision by State educational agency

(c) If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

Enumeration of rights accorded parties to hearings

(d) Any party to any hearing conducted pursuant to subsections (b) and (c) of this section shall be accorded (1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children, (2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses, (3) the right to a written or electronic verbatim record of such hearing, and (4) the right to written findings of fact and decisions (which findings and decisions shall also be transmitted to the advisory panel established pursuant to section 1413(a)(12) of this title).

Civil action; jurisdiction

(e)(I) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under the subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(4) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

Supreme Court, U.S.
FILED
OCT 9 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-409

IN THE

Supreme Court of the United States

October Term, 1985

DANIEL GLEN HUNT, by and through his father and next friend, EDWARD RAY HUNT, and EDWARD RAY HUNT and ELLEN HUNT,

Petitioners

v.

GUILFORD COUNTY BOARD OF EDUCATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION

A. Frank Johns
Post Office Box 3585
Greensboro, North Carolina 27402
(919) 275-9567
Counsel for Petitioners

Of Counsel:
David B. Puryear, Jr.

October 7, 1985

No. 85-409

IN THE

Supreme Court of the United States

October Term, 1985

DANIEL GLEN HUNT, by and through his father and next friend, EDWARD RAY HUNT, and EDWARD RAY HUNT and ELLEN HUNT,

Petitioners

v.

GUILFORD COUNTY BOARD OF EDUCATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITIONER'S SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION

Petitioners file this supplemental brief pursuant to Rule 22.6 of the Rules of the Supreme Court of the United States.

The petition in this case was received and docketed by the Clerk on September 10, 1985. On the same day, September 10, 1985, a notation in United States Law Week disclosed the existence of another petition for writ of certiorari, now pending in this Court, which presents the same question as presented by petitioners herein. That other case is *Massachusetts Hospital School v. Stock,* No. 85-40, in which the Commonwealth of Massachusetts seeks review of *Stock v. Massachusetts Hospital School,* 394 Mass. 437, 476 N.E. 2d 210 (1985) (Stock II). *See,* 54 U.S.L.W. 3151.

In *Stock II,* the Massachusetts Supreme Judicial Court determined that the plaintiff was entitled to an award of attorney's fees pursuant to 42 U.S.C. §1988, as a prevailing party with a substantial unaddressed constitutional claim. *Stock II,* 394 Mass. at 442, 476 N.E.2d at 213. The plaintiff, parent of a handicapped child had complained of various denials of procedural safeguards afforded by EHA. *Id.* at 439, 476 N.E.2d at 211. The Massachusetts court previously had held that the plaintiff parent had proven these procedural violations of EHA. Among the parent's complaints was the refusal of the defendant education agencies to conduct an administrative hearing on the substantive issue of the child's special education entitlement. *Stock v. Massachusetts Hospital School,* 392 Mass. 205, 212-213, 467 N.E.2d 448, 453-454 (1984) (*Stock I*). The *Stock I* court held that, because the failure of the defendant school system to provide administrative due process comprised statutory violations, it need not address the plaintiff parent's claims of denial of due process under the United States Constitution and 42 U.S.C. §1983. *Ibid.*

Nevertheless, the *Stock II* court agreed that the plaintiff-parent was entitled to attorney's fees under 42 U.S.C. §1988. In its holding, the *Stock II* court expressly relied upon this Court's guidance in footnote 17 in *Smith v. Robinson,* ___ U.S. ___, ___, 104 S.Ct. 3457, 3471, 82 L.Ed.2d 746 (1984). Also cited as support for the judgment in *Stock II* were *Rose v. Nebraska,* 748 F.2d 1258 (8th Cir. 1984); *Teresa Diane P. v. Alief Independent School District,* 744 F.2d 484 (5th Cir. 1984); and, *Quackenbush v. Johnson City School District,* 716 F.2d 141 (2d Cir. 1983). These are the same federal cases which your petitioners cite as conflicting with the decisions below in this case. The denial of EHA administrative hearing rights, as in *Stock,* is the same type of violation which petitioners in this case alleged as a claim under 42 U.S.C. §1983. The determination by the *Stock II* court, that the plaintiff-parent had presented a substantial denial-of-due-process claim under 42 U.S.C. §1983, is the converse of the decisions below in this case, holding that the plaintiff-parents failed to state a claim under 42 U.S.C. §1983.

The pending petition for writ of certiorari in *Stock* pre-

sents the following question: "Do the procedural safeguards set out in the Education for All Handicapped Children Act manifest Congress' intent to preclude resort to 42 U.S.C. §1983 on a due process challenge?" This is the same question presented by petitioners in this case, although stated so as to emphasize the state's position. In this case, the federal district court and court of appeals answered the very question presented by the *Stock* petitioners — in the affirmative. *See,* Cert. App. 6, 45-46, 51. The *Stock II* court answered the question in the negative, as did the federal court decisions upon which the Massachusetts Supreme Court relied.

The pendency of the petition of the Attorney General of the Commonwealth of Massachusetts, No. 85-40, seeking review of *Stock II,* underscores your petitioners' argument in this case that the question presented is an important federal statutory issue of national significance which has not been but should be settled by this Court. Further, the decision below of the Fourth Circuit Court of Appeals now is in conflict not only with other federal courts of appeals, but also represents a federal court of appeals' decision of a federal question in a way in conflict with a state court of last resort. Rule 17.1, U.S. Sup. Ct. Rules

Petitioners again respectfully urge the Court to issue its writ of certiorari to review the judgment below of the Fourth Circuit Court of Appeals.

A. Frank Johns
Post Office Box 3585
Greensboro, North Carolina 27402
(919) 275-9567
Counsel for Petitioners

Of Counsel:
David B. Puryear, Jr.

CERTIFICATE OF SERVICE

I certify that on the 7th day of October, 1985, I served the foregoing and attached Petitioners' Supplemental Brief in Support of Petition on Respondent by depositing three copies thereof in the United States Postal Service first-class, postage prepaid, addressed as follows:

John W. Hardy, Esq.
James W. Lung, Esq.
Counsel for Guilford County
Board of Education
Post Office Box 419
Greensboro, North Carolina 27402

This the 7th day of October, 1985.

A. Frank Johns
Counsel for Petitioners

Supreme Court, U.S.
FILED
OCT 9 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-409 (4)

In The
Supreme Court of the United States
October Term, 1985

DANIEL GLEN HUNT, by and through his father and next friend, EDWARD RAY HUNT, and EDWARD RAY HUNT and ELLEN HUNT,

Petitioners,

v.

GUILFORD COUNTY BOARD OF EDUCATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

JOHN W. HARDY
Post Office Box 419
Greensboro, North Carolina 27402
(919) 378-0580

Counsel for Petitioners

Of Counsel:
JAMES WILLIAM LUNG

October 8, 1985

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

BEST AVAILABLE COPY

13 pp

QUESTION PRESENTED

Can parents of a handicapped child maintain an action under 42 U.S.C. § 1983 to assert a claim for damages against a local board of education for a violation of the procedures set out in the Education for All Handicapped Children Act, 20 U.S.C. § 1415, when the parents do not allege that the violation can be attributed or imputed to the local board?

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Statement of the Case	1
Argument	3
I. The Fourth Circuit did not err in affirming decision of the District Court	3
II. The decision below does not conflict with the decisions of other Courts of Appeals	5
III. This case is an inappropriate vehicle for resolving the question of whether or not the procedural safeguards set out in the EAHCA were intended by Congress prelude resort to § 1983 to remedy a violation of those procedures	6
Conclusion	8

TABLE OF AUTHORITIES

CASES:

Hymes v. Harnett County Board of Education, 664 F2d 410 (4th Cir. 1981) 3, 4, 5

Manecke v. School Board of Pinellas County, Florida, 762 F.2d 912 (11th Cir. 1984) 6, 7

Monell v. Dept. of Soc. Serv. of City of N.Y., 436 U.S. 658, 56 L. Ed. 2d 611, 98 S.Ct. 2018 (1978) 4

Polk County v. Dodson, 454 U.S. 312, 70 L.Ed. 509, 102 S.Ct. 445 (1981) 5

Quackenbush v. Johnson City School District, 716 F.2d 141 (2nd Cir. 1983) 5

Rose v. Nebraska, 748 F.2d 1258 (8th Cir. 1984) 7

Smith v. Robinson, — U.S. —, 104 S.Ct. 3457, 82 L.Ed. 2d 746 (1984) 6, 7

TABLE OF AUTHORITIES—Continued

Page

STATUTES AND REGULATIONS:

34 C.F.R. § 300.507(a)(1) 2
20 U.S.C. § 1401 ..... *passim*
20 U.S.C. § 1414(b)(2) 2
42 U.S.C. § 1983 ..... *passim*

No. 85-409

In The

Supreme Court of the United States

October Term, 1985

DANIEL GLEN HUNT, by and through his father and next friend, EDWARD RAY HUNT, and EDWARD RAY HUNT and ELLEN HUNT,

Petitioners,

v.

GUILFORD COUNTY BOARD OF EDUCATION,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

The facts of the case are stated fully in the decision of the District Court (Petitioners' Appendix pp. 2-28) However, Petitioners have attempted in their Statement of Facts to avoid a crucial fact in the case by misstating

the status of the administrative hearing officer. This misstatement requires elaboration.

The administrative hearing officer was not, as stated by Petitioners, "the Respondent's administrative hearing officer." (Petitioners' Brief pp. 6, 8) Petitioners did not allege in their amended complaint that the hearing officer was an agent or employee of Respondent or under the direction or control of Respondent, nor have Petitioners alleged any fact from which it might be inferred that the failure of the administrative hearing officer to render a decision can be imputed to the Respondent Guilford County Board of Education. (*See* Petitioners' Appendix, pp. 54-59)

Section 1414(b)(2) of the Education for All Handicapped Children Act, 20 U.S.C. § 1401 et seq., requires that

> No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such (local educational) agency or unit involved in the education or care of the child.

The regulations promulgated by the Department of Education to enforce the Education for all Handicapped Children Act also require that a hearing may not be conducted by a person who is an employee of a public agency which is involved in the education or care of a child. 34 C.F.R. § 300.507(a)(1).

Respondent complied with the requirements of the EAHCA with respect to the independence of the hearing officer. The hearing officer was not an agent or employee of the Guilford County Board of Education.

Petitioners misstate the relationship between Respondent and the administrative hearing officer. There is ab-

solutely no basis for the assertion by Petitioners in their brief that the administrative hearing officer in this case was "Respondent's hearing officer."

ARGUMENT

I. THE FOURTH CIRCUIT DID NOT ERR IN AFFIRMING DECISION OF THE DISTRICT COURT.

The issue before the Court of Appeals was whether or not the District Court erred in dismissing Petitioners' claim for damages under the Civil Rights Act of 1871, 42 U.S.C. § 1983. Petitioners assert that the hearing officer in this case failed to render a final decision as required by the EAHCA, and that this failure gives rise to a cause of action for damages and attorney's fees under 42 U.S.C. § 1983.

The primary reason given by the District Court for the dismissal of this claim was that the "comprehensive nature of the EAHCA's remedial scheme" precluded resort to Section 1983 where the 1983 claim is one for damages for violation of either the substance or the procedures of the EAHCA. (Petitioners' Appendix, 46) Contrary to Petitioners' argument, this holding is entirely consistent with the Fourth Circuit holding in *Hymes v. Harnett County Board of Education*, 664 F.2d 410 (4th Cir. 1981).

Hymes holds that a plaintiff may obtain injunctive relief under 42 U.S.C. § 1983 where plaintiffs have had to resort to judicial relief to force a local education agency to comply with the procedures set out in the EAHCA. Pe-

titioners did not seek an injunction to require the hearing officer in this case to render a decision. Rather, Petitioners chose to file an action seeking money damages and attorney's fees under § 1983. The District Court properly relied upon *Hymes v. Harnett County Board of Education,* 664 F.2d 410 (4th Cir. 1981) in dismissing petitioners' claim.

A second and more important basis for dismissing Petitioners' purported claim under § 1983 was alluded to in the opinion of the District Court when it found as a fact that

> Defendants (including Respondent) did not deny the Hunts any avenue for administrative relief under state law or make a sham of those avenues.

(Petitioners' Appendix 47; Petitioners' Brief 8.)

It has already been pointed out that Petitioners do not allege that the administrative hearing officer was an agent or employee of Respondent Guilford County Board of Education. Even if this were the case, merely showing an employment or agency relationship between the Respondent and the hearing officer would not be sufficient to state a cause of action against the Respondent for the failure of the hearing officer to render a decision. This Court in *Monell v. Dept. of Soc. Serv. of City of N.Y.,* 436 U.S. 658, 56 L. Ed. 2d 611, 98 S.Ct. 2018 (1978) stated that

> . . . a local government may not be sued under § 1983 for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983.

Ibid, 436 U.S. 658, 694, 56 L.Ed. 2d 611, —, 98 S.Ct. 2018, 2037-38. Section 1983 will not support a claim based upon a *respondeat superior* theory of liability. *Polk County v. Dodson,* 454 U.S. 312, 70 L.Ed. 509, 102 S.Ct. 445 (1981).

There is thus a basis for dismissing Petitioners' claim which is totally unrelated to the relationship between the EAHCA and § 1983. Petitioners failed to allege that the hearing officer was acting pursuant to a policy or custom of the Respondent Guilford County Board of Education. Petitioners have thus failed to allege an essential element of their cause of action under § 1983 and the claim was properly dismissed on that basis.

II. THE DECISION BELOW DOES NOT CONFLICT WITH THE DECISIONS OF OTHER COURTS OF APPEALS

All cases addressing the interplay between the EAHCA and 42 U.S.C. § 1983 cited by Petitioners can be distinguished from the instant case. The cases cited by Petitioners all address a violation of the procedural requirements of the EAHCA by an agent or employee of a local educational agency. The case below does not.

In *Hymes v. Harnett County Board of Education,* 664 F.2d 410 (4th Cir. 1981), agents of a local school board changed the educational placement of a child without complying with the procedures set out in the EAHCA. In *Quackenbush v. Johnson City School District,* 716 F.2d 141 (2nd Cir. 1983) it was alleged that an employee of a local school district denied a child an evaluation which had been requested by the child's parent by having the

mother sign a blank form and then checking the box on the form which indicated an evaluation was not desired. In *Manecke v. School Board of Pinellas County, Florida,* 762 F.2d 912 (11th Cir. 1984), the parents of a handicapped child forwarded a request for a due process hearing to the school superintendent, who forwarded the request to the school board attorney, assuming that the attorney would schedule a due process hearing. The hearing was not scheduled within the time limitations of the EAHCA.

As has been previously demonstrated, Petitioners in this case have not alleged that the procedural violation of EAHCA was caused by an agent or employee of the Respondent, or that it was a result of a policy or practice of the Guilford County Board of Education. This case, because of its unique factual background, is clearly distinguishable from the cases cited by Petitioners and is not in conflict with those cases.

III. THIS CASE IS AN INAPPROPRIATE VEHICLE FOR RESOLVING THE QUESTION OF WHETHER OR NOT THE PROCEDURAL SAFEGUARDS SET OUT IN THE EAHCA WERE INTENDED BY CONGRESS TO PRECLUDE RESORT TO § 1983 TO REMEDY A VIOLATION OF THOSE PROCEDURES

This Court held in *Smith v. Robinson,* — U.S. —, 104 S.Ct. 3457, 82 L.Ed. 2d 746 (1984) that the Education for All Handicapped Children Act is the exclusive vehicle through which a plaintiff may assert an equal protection claim to a publicly financed education. The Court left unresolved the question of whether or not plaintiffs may maintain an independent due process challenge to state procedures under § 1983. There are a number of reasons

why this case is not an appropriate vehicle for answering that question.

First, the issue is not ripe for review by this Court. There have been only two published decisions of Circuit Courts of Appeals since *Smith v. Robinson* which address this issue. Neither *Manecke v. School Board of Pinellas County, Florida,* 762 F.2d 912 (11th Cir. 1984) nor *Rose v. Nebraska,* 748 F.2d 1258 (8th Cir. 1984) address the issues which this Court in footnote 17 of its opinion in *Smith v. Robinson* suggested need to be addressed to resolve the question.

Second, if the issue is ripe for review, then the Court has before it a much more appropriate case in which to grant Certiorari. On March 15, 1985, the State of Nebraska filed a Petition for Certiorari in the case of *Rose v. Nebraska,* 748 F.2d 1258 (8th Cir. 1984). *See* 53 U.S.L.W. 3815. In *Rose v. Nebraska* the attorney's fee question has been addressed in two District Court opinions, 491 F.Supp. 1074 and 575 F.Supp. 132, and three Eighth Circuit opinions, 645 F.2d 592, 687 F.2d 1164, and 748 F.2d 1258.

A third reason why this case is not an appropriate vehicle for answering the question left open by *Smith v. Robinson* is the complexity of the case below. Plaintiffs cited five separate state and federal statutes as the basis for liability on the part of a number of defendants who are no longer parties in this action. Plaintiffs also sought other and different forms of relief than those which are available under 42 U.S.C. § 1983. In fact, the precise question raised by Petitioners in this Petition for Certiorari was pursued by them aggressively only after this Court in *Smith v. Robinson* foreclosed any possibility of recover-

ing attorney's fees except under the issue which Petitioners purport to present.

CONCLUSION

In conclusion, the question presented by Petitioners was fully and fairly addressed by the Court below. Their lawsuit was properly dismissed because they failed to allege an essential element of their cause of action. Finally, to the extent that Petitioners present a conflict among the Circuit Courts of Appeals, that conflict cannot be adequately addressed in the case at bar.

Respectfully submitted,

JOHN W. HARDY
110 Commerce Place
Post Office Box 419
Greensboro, North Carolina 27402
(919) 378-0580
Counsel for Petitioners

Of Counsel:
JAMES WILLIAM LUNG
110 Commerce Place
Post Office Box 419
Greensboro, North Carolina 27402
(919) 378-0580